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**A FRIENDSHIP IN THE LAW:  
DAVID DAUBE AND T B SMITH**

Hector L MacQueen\*

In 1991 Tony Weir drew our attention to five friendships in the law, or “relationships to which – to use a lawyer’s expression – lawyers were parties”.<sup>1</sup> While he reached no general conclusions about lawyers’ friendships, the relationships surveyed “were good and rich”.<sup>2</sup> They included some of the great names of the law – Domat, Holmes, Savigny – but it is fair to say that most of the other lawyers discussed by Weir gained their fame outside, or beyond, their profession – Montaigne, La Boétie, Boswell, Jakob Grimm – while some of these lawyers had friends – Pascal, Dr Johnson, Harold Laski – whose links with the law came through their friendships and intellectual interests rather than professional or academic commitment. This article reworks and expands upon an earlier piece adding one further friendship to the examples discussed by Weir, but differing from them in that the friends were both academic lawyers of international renown.<sup>3</sup> Their relationship began before they became colleagues in the Faculty of Law at Aberdeen University between 1951 and 1955. It lasted for well over thirty years, despite very different approaches to their subject and the very different directions of their post-Aberdeen careers.

Prior to my previous article, the relationship between David Daube (1909-1999) and Thomas Broun Smith (1915-1988) had not been much explored in the now quite numerous writings on the lives and works of the two men. It was clear that Daube’s 1951 appointment to the Chair of Jurisprudence at Aberdeen during Smith’s time as Dean of Law there was a major development in the former’s academic

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\* Professor of Private Law, University of Edinburgh; Commissioner, Scottish Law Commission. I am grateful to Lady Ann Smith and the Daube family for permission to reproduce the unpublished writings of T B Smith and David Daube contained in the appendices to this article, and to Sir Alan Peacock for much appreciated assistance in other respects. Reinhard Zimmermann kindly identified and made available to me relevant material published in Germany. I received outstanding help and support from the staff of Aberdeen University Library Special Collections in working on the Daube archive in their care. (It was a pleasant coincidence that on one of the days I worked in the archive in July 2012 Jonathan Daube followed his father 22 years before in receiving an honorary degree from the University of Aberdeen.) Other assistance is recognised at the appropriate places in the footnotes.

<sup>1</sup> Tony Weir, *Friendships in the Law*, 6/7 TULANE CIVIL LAW FORUM 61 (1991-92), quotation at 93.

<sup>2</sup> Id, 93.

<sup>3</sup> Hector L. MacQueen, *David Daube and T. B. Smith*, in DAVID DAUBE: A CENTENARY CELEBRATION (Ernest Metzger, ed, 2010), 11-36.

career.<sup>4</sup> A practising and orthodox Jew, Daube had studied and taught in Cambridge since 1933, after the rise to power of Hitler and the Nazis compelled him to flee his native Germany. After completing a PhD in Roman law at Gonville and Caius College in Cambridge under the supervision of William Buckland (who held the Regius Chair of Civil Law in the University and was also President of the College), Daube became a senior research fellow there in 1935.<sup>5</sup> But prospects of further advancement at Cambridge appeared to stall after the death of Buckland in 1946. Patrick Duff (1901-1991) was appointed to succeed Buckland in the Regius Chair. A good friend of Daube, but, still only in his mid-forties, Duff was clearly destined to hold the chair for many years to come, barring accident or misadventure. Daube's college fellowship came to an end in 1946 as well, and although he was appointed to a university lectureship in Roman law, his further prospects were not helped by his unwillingness to engage with teaching English law or by a difference of opinion with his senior Law Faculty colleague, Hersch Lauterpacht, the Whewell Professor of International Law, on the validity of the Nuremberg trials (Daube against while Lauterpacht, also a Jew but originally from Austria and a strong Zionist, was for).<sup>6</sup> Aberdeen was a much-needed opportunity for Daube to move onward and upward.

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<sup>4</sup> There are biographies of both men in the OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (2004, henceforth ODNB). For Daube see Tony Honoré, *Daube, David (1909–1999)*, ODNB [http://www.oxforddnb.com/view/article/72058, accessed 16 Aug 2012] and further Alan Rodger, *David Daube (8.2.1909–24.2.1999)*, 118 ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE, XIV-LII (2001, henceforth “Rodger, ZSSR”); idem, *David Daube (1909–1999)* in JURISTS UPROOTED: GERMAN-SPEAKING ÉMIGRÉ LAWYERS IN TWENTIETH-CENTURY BRITAIN (Jack Beatson and Reinhard Zimmermann, eds, 2004) 233–48; and idem, *Law for All Times: the Work and Contribution of David Daube*, 2 ROMAN LEGAL TRADITION 3 (2004); also Peter Stein, *David Daube, 1909–1999* 111 PROCEEDINGS OF THE BRITISH ACADEMY 429 (2001); Calum Carmichael, IDEAS AND THE MAN: REMEMBERING DAVID DAUBE (2004); and the Berkeley tribute website, <http://www.law.berkeley.edu/library/daube/>.

<sup>5</sup> See further Alan Rodger, *Buckland and Daube: a Cambridge Friendship*, 127 ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE 245–54 (2010).

<sup>6</sup> Rodger, ZSSR (note 4), XXV, XXVII; Katherine Vanden Heuvel, *Professor David Daube: A Tribute* 87 CALIFORNIA L.R. 1051, 1053 (1999). See also Jonathan M. Daube, *David Daube*, in DAVID DAUBE (note 3), 138–80 at 170, for his father's opposition to the Nuremberg trials. On Lauterpacht, whose parental family was all but wiped out in the Holocaust, see Martti Koskenniemi, *Hersch Lauterpacht (1897–1960)*, in JURISTS UPROOTED (note 4), 601–61, especially at 633 and section XI (639–43) on “Nuremberg and Post-war Reconstruction” (note too Lauterpacht's active involvement in the prosecution of William Joyce (“Lord Haw Haw”) for treason, mentioned at *ibid.*, 639 note 173, with which Daube likewise did not agree (see Letter 1 below)); see also A. W. Brian Simpson, *HUMAN RIGHTS AND THE END OF EMPIRE: BRITAIN AND THE GENESIS OF THE EUROPEAN CONVENTION* (2001), index s.v. “Lauterpacht, Hersch”.

Daube's arrival was also clearly a significant moment in the project to create a law school of international standing in Aberdeen. Inspired by the University's lawyer Principal, Thomas Taylor,<sup>7</sup> the project was carried forward by Smith as Dean of Law from his appointment late in 1948 to the Chair of Scots Law. By 1951 Daube was already a scholar of international repute in his fields of Roman and ancient Jewish law; and when he departed from Aberdeen in 1955, it was to take up the Regius Chair of Civil Law at the University of Oxford. He would go on from there in 1970 to become Director of the Robbins Hebraic and Roman Law Collections and Professor in the Boalt Hall School of Law at the University of California-Berkeley (now "rebranded" as Berkeley Law).

The development of Smith's own international reputation had by contrast scarcely begun in 1951, although as this article will show, he was clearly already hard at work creating an international network of academic contacts in efforts bearing fruit later in the decade with visiting appointments at Tulane (1957), Cape Town and Witwatersrand (both 1958). An outstanding graduate in law at Oxford in 1937, he was first called to the Bar in England, although a Scot by birth. The development of his legal career was interrupted by the Second World War, in which however he served with great distinction in the Political Intelligence Branch. Smith joined the Scottish Bar (the Faculty of Advocates) in 1947 and practised for nearly two years before taking up his Aberdeen appointment. He subsequently held, first, the Chair of Civil Law at Edinburgh (from 1958) and, second, the Chair of Scots Law there (from 1968). He became a full-time member of the Scottish Law Commission in 1972, holding that appointment until retirement in 1980. Smith was knighted in 1981 for his services to Scots law; his final project was the general editorship of the multi-volume *Laws of Scotland: Stair Memorial Encyclopaedia*, begun in 1981. He died in Edinburgh in 1988.<sup>8</sup> Far away on the western seaboard of the USA, Daube became

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<sup>7</sup> See T. M. Knox, *Taylor, Sir Thomas Murray (1897–1962)*, rev. ODNB [<http://www.oxforddnb.com/view/article/36438>, accessed 16 Aug 2012]. Smith's predecessor in the Aberdeen Scots Law chair between 1935 and 1948, Taylor practised at the Scottish Bar in the 1920s and early 1930s; but his roots were firmly in the north-east of Scotland; he was an Aberdeen rather than an Edinburgh graduate, and his politics at the time were Labour; hence the switch to academe from a legal practice with but slim prospects of advancement.

<sup>8</sup> See David M. Walker, *Smith, Sir Thomas Broun (1915–1988)*, rev. ODNB [<http://www.oxforddnb.com/view/article/40100>, accessed 16 Aug 2012]. For recent work on T. B.

“the world’s oldest hippie”<sup>9</sup> and outlived Smith for eleven years; but he too remained academically active until very near the end.

In his obituary of Daube in the *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* Alan Rodger notes:

Smith ... saw it as his mission to project a vision of Scots Law as essentially a Civilian system of law which had come under too much influence from English law. Daube and he got on well together, even though they were very different men and Daube liked to poke fun at Smith’s somewhat military bearing and outlook (Smith was a colonel). While Smith had no detailed knowledge of, or indeed interest in, classical Roman Law, he was favourably disposed towards the study of Roman Law in general. This proved useful when de Zulueta offered his Roman Law library to Aberdeen University for the token sum of £300 plus the cost of carriage. At the time Smith was active in developing the law library and, with his support, the University accepted de Zulueta’s offer and so secured a substantial specialist library which provided Daube with the necessary materials for his work in Roman Law.<sup>10</sup>

In his *Ideas and the Man: Remembering David Daube*, Calum Carmichael summarises these remarks by Rodger and adds in a footnote:

At my first meeting with Daube in Edinburgh in 1962, Daube introduced me to Smith. After Smith left, Daube told me that, in Scotland, Smith never wore a kilt but did so every time he went to London. He wanted to remind those whom he

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Smith, see A MIXED LEGAL SYSTEM IN TRANSITION: T. B. SMITH AND THE PROGRESS OF SCOTS LAW (Elspeth C. Reid and David L. Carey Miller, eds, 2005); note also Kenneth G. C. Reid, *The Idea of Mixed Legal Systems*, 78 TULANE L.R. 5 (2003).

<sup>9</sup> Carmichael, IDEAS AND THE MAN (note 4), 130.

<sup>10</sup> Rodger, ZSSR (note 4), xxvii. On de Zulueta, Professor of Civil Law at Oxford 1919-1948, see F. H. Lawson, *Zulueta, Francis de (1878-1958)*, rev., ODNB [http://www.oxforddnb.com/view/article/37089, accessed 16 August 2012]. On Smith’s military rank and interests: he was actually a lieutenant-colonel. From 1950 he commanded the University Training Corps at Aberdeen, and his enthusiasm for the role emerges clearly in his full and eloquent reports in the *Aberdeen University Review* of the time about the doings of the UTC (for the first of these see 34 ABERDEEN UNIVERSITY REVIEW 49 (1951)). Lady Ann Smith tells me that her husband’s military career began in the artillery but his inability to make mathematical or arithmetical computations severely affected the accuracy of his orders to the gunners, and he was accordingly moved over to intelligence.

met south of the Scottish border that London “was not the centre of the United Kingdom, and certainly not the centre of the world.”<sup>11</sup>

Late in 2007 I was fortunate enough to come into possession of a quantity of Smith’s private papers.<sup>12</sup> These included a large collection of offprints, neatly organised into folders each bearing the name of the author whose works are gathered together within. The collection was clearly incomplete, since it included only those whose surnames began with A, B, C and D. One of the bulkiest of these folders bore the name Daube, and inside it were some 40 offprints and photocopies of various Daube publications.<sup>13</sup> The majority of these prints were inscribed by Daube, and they ranged in date from 1948 to 1984. The inscriptions began in a formal way – “With the writer’s compliments” – but soon moved to what became the typical “Kindest regards, David”. By the late 1970s, the regards had become “warmest” or “affectionate”.

The evidence for enduring friendship contained within the offprint collection went further than this. In amongst the offprints were three letters from Daube to Smith: the earliest anticipating Daube’s arrival in Aberdeen, as it is dated from Cambridge on 10 August 1950.<sup>14</sup> The other two came from Daube’s Berkeley days, being dated 2 April 1975 and 3 January 1985.<sup>15</sup> They confirmed the affection in which Daube held, not only Smith, but his wife Ann. The later two letters were both addressed to the Smiths as a couple. The earliest of the letters makes it seem also probable that Ann Smith was significantly involved in making the Daube family welcome and at home in Aberdeen, and that this began even before the family’s arrival in the city.

At the time of writing my previous article, based upon the material just described, I was aware that there might be further evidence of the friendship in the archive of David Daube’s personal papers which his children had then recently

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<sup>11</sup> Carmichael, *IDEAS AND THE MAN* (note 4), 94 note 4. Lady Ann Smith tells me that in fact Smith wore a kilt every day he could in Scotland (for example, to go for a walk or to formal dinners), but not when he went to work at the University (and not, in my personal observation, at the Scottish Law Commission either).

<sup>12</sup> The papers, minus the offprint collection mentioned below, are now lodged in Edinburgh University Library Special Collections, reference GB 237/Coll-1250.

<sup>13</sup> A list may be found in Appendix 1 to MacQueen (note 3) 23-9.

<sup>14</sup> See now Letter 2 below.

<sup>15</sup> Transcriptions of these letters are printed in Appendix 2 to MacQueen (note 3), 30-3.

deposited in Aberdeen University Library.<sup>16</sup> Daube seems never to have knowingly thrown away any papers that came to him, and the result is an enormous collection of documents now contained in over 300 boxes, files and folders. The correspondence files are roughly divided alphabetically by surname, and as a result I have now been able to ascertain that this archive contains a substantial amount of personal correspondence from Smith and some of Daube's replies, as he seems to have kept copies of letters which he regarded as important for business reasons.<sup>17</sup> There is also a file devoted to academic business papers from Daube's time at Aberdeen which includes communications between the two colleagues.<sup>18</sup> Together, all this material enables us to confirm both the warmth of the Daube-Smith personal relationship until the latter's death, and the significance of Daube's arrival for law teaching in Aberdeen and, indeed, in Scotland.

The earliest surviving letter from Daube to Smith in the archive is dated 24 March 1950,<sup>19</sup> some five months prior to the one of August 1950 printed as one of the appendices to my previous article and reprinted here for the sake of completeness.<sup>20</sup> The March letter shows that discussions were already well under way between the two men about the possibility of Daube's being appointed to an Aberdeen Chair (which was to be created for him). But Daube had at least two other options open to him: a Readership at Cambridge, the income for which would be equal to that for the Aberdeen post; and an offer of a Chair at the Hebrew University in Jerusalem. While the latter may have tempted Daube intellectually and spiritually in some ways, the unsettled conditions in the very new state of Israel were not attractive from the point of view of his wife and their young family.<sup>21</sup> It is clear, however, that he was extremely taken with the ambience of Old Aberdeen, where the University had stood since 1495 and was still centred upon the late medieval King's College. He was also

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<sup>16</sup> These are catalogued under the references Acc[ession] 60 (253 boxes) and Acc[ession] 115 (97 boxes).

<sup>17</sup> A[berdeen] U[niversity] L[ibrary], Acc 60, 3/253 (Folders of Corresp. and articles R-S), 7/253 (Misc Corresp. S-W); Acc 115, 57/97 (Corresp. S).

<sup>18</sup> AUL, Acc 115, 4/97 ("University admin Aberdeen"). There are similar files for Cambridge (3/97), Oxford (5/97) and Berkeley (6/97). The massive files of offprints do not seem at first sight to be arranged in such a way as to allow the ready identification of papers that Smith probably sent to Daube, and that search will have to await another occasion.

<sup>19</sup> Letter 1 below.

<sup>20</sup> Letter 2 below.

<sup>21</sup> See Jonathan Daube, (note 6), 148 (also noting a possible concern about command of modern as distinct from classical Hebrew, and a disagreement with the Zionist ideology on which the Hebrew University was founded).

attracted by an intellectual project there which placed jurisprudence amongst the humanities and linked law with history, classics and divinity.<sup>22</sup>

The March 1950 letter refers to Smith acting as an “Assessor” and possibly attending a future examiners’ meeting in Cambridge.<sup>23</sup> The records of the Cambridge Law Faculty reveal that on 3 November 1949 Smith was listed as an “assessor”, i.e. as a second marker.<sup>24</sup> The subject in which he was to perform this function is not named. Most probably it was the Cambridge course in Scots Law, then taught by Desmond Ashton-Cross,<sup>25</sup> since the latter’s name appears on the examiners’ list immediately before Smith’s. Since Smith had clearly still to attend an examiners’ meeting in March 1950, yet had evidently already met with Daube, the immediate inference is that this meeting must have taken place in Cambridge, perhaps when Smith was visiting Ashton-Cross to learn more about his course in Scots Law or to discuss the examination paper to be set. There is however no evidence for such a visit, or of any friendship or other link between Daube and Ashton-Cross. It is most likely that Smith learned by another route of Daube’s desire to take his career on to its next stage and that he was not necessarily settled in Cambridge.

One possible source of information about Daube was actually in Aberdeen University alongside Smith. The name of Alec Parker, Reader and head of the Spanish department in the University, is mentioned more than once in the other early correspondence between Smith and Daube, in a way showing that he was known to both.<sup>26</sup> Daube and Parker were in fact old friends, since prior to coming to Aberdeen in 1939 Parker had been a Fellow of Gonville & Caius College in Cambridge, indeed being elected as such in 1933, the year of Daube’s arrival from Germany.<sup>27</sup> Peter

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<sup>22</sup> On the post-war development of Aberdeen University as a place in which arts, science and law greatly expanded student numbers and placed “emphasis on teaching in an atmosphere of research”, see John Hargreaves, *Academic Strategies of Expansion*, in ABERDEEN UNIVERSITY 1945-1981: REGIONAL ROLES AND NATIONAL NEEDS (John D. Hargreaves with Angela Forbes, eds., 1989), 4-14 (quotation at 5).

<sup>23</sup> Letter 1.

<sup>24</sup> The Cambridge Law Faculty records are in Cambridge University Archives, University/Min.V.128, and may most readily be referred to within that file by the date of the meeting in question. I am most grateful to Professor David Ibbetson for examining these records for me.

<sup>25</sup> On Ashton-Cross, see Hector L. MacQueen, *Glory with Gloag or the Stake with Stair: T. B. Smith and the Scots Law of Contract*, in MIXED LEGAL SYSTEM IN TRANSITION (note 8), 148 note 44.

<sup>26</sup> Letters 2 and 3.

<sup>27</sup> For Parker, who was a leading British Hispanist, see the *British Preface* (by Ian Michael) and the *American Preface* (by Rodolfo Cardona) to 61 BULLETIN OF HISPANIC STUDIES 263-6 (1984), a special



Stein and Alan Rodger note the active mutual social engagement of the younger Fellows (including Daube) at the College in the 1930s.<sup>28</sup> Smith's widow has told me that she believes Parker to have been an important influence in persuading Daube that Aberdeen would provide a congenial environment in which to work.

However the opportunity was scented, the ambitious young Dean of Law from Aberdeen must have decided to try and take it. There must also have been support from Principal Taylor, since Daube's letter shows that the creation of a new Chair specifically for him was in contemplation.<sup>29</sup> Perhaps Smith invited Daube to visit his university, and received a positive response. In all probability Smith and his wife Ann hosted Daube and his wife Herta in their home at 33 Queen's Road on the occasion of this visit. Further correspondence later in the summer shows that the two men were already well acquainted with each other's spouses, and that Daube had met the Smiths' young children (the older of whom were communicating with him in their own right).<sup>30</sup> The foundations of the warmth between the two men were most probably laid by this first visit. Thirty years later Daube wrote: "The home of Tom, Ann and their three children still lives on in my memory as a source of inspiration: the five of them were very distinct, differently endowed individuals, yet together they formed a wonderful family."<sup>31</sup> The welcome probably formed a significant contrast with Daube's only known previous encounter with Scottish legal academe. In 1938 his application for the Chair of Civil Law at Edinburgh was rejected after interview, at least in part because of anti-semitic sentiment within the appointing committee.<sup>32</sup>

The prospect of a Readership at Cambridge for Daube came to naught in the early summer of 1950, in circumstances that were probably as embittering as the Edinburgh experience. On 1 June the Cambridge Law Faculty, by a majority of 6 - 5 with two abstentions, voted to create the Readership; but the minute notes that the matter was not proceeded with since there was not an absolute majority in favour of

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issue in his honour with a bibliography by Ann L. MacKenzie at id, 267-70; also obituary by Javier Herrero, *Alexander A. Parker (1908-1989)*, 67 BULLETIN OF HISPANIC STUDIES 177-80 (1990). Jonathan Daube confirms (pers. comm., 21 August 2012) the Parker-Daube friendship.

<sup>28</sup> Stein (note 4), 431 (Mah Jongg); Rodger, ZSSR (note 4), XXIII (Mah Jongg and chess).

<sup>29</sup> See Letter 1.

<sup>30</sup> See Letters 1-4.

<sup>31</sup> David Daube, *Ahab and Benhadad: a municipal directive in international relations*, 27 JURIDICAL REVIEW 62 (1982).

<sup>32</sup> See Rodger, ZSSR (note 4), XXI-XXIII.

the promotion. The Faculty minutes for 27 July note further that there was now no request for the establishment of a Readership from October 1950.<sup>33</sup> Daube must by then have decided that the time had come to leave Cambridge, his home since his expulsion from Nazi Germany in 1933. On 27 June Smith had written to him about houses and schools in Aberdeen, showing that the two had already concluded the deal for Daube's appointment and move north.<sup>34</sup> The previously published letter of 10 August from Daube to Smith fits into this context of preparation for relocation, which was probably already fixed for early 1951.<sup>35</sup> The formal conditions of appointment to the University, to be found in Daube's file of Aberdeen academic business papers,<sup>36</sup> give a start date of March 1951. He delivered his inaugural lecture, "The Scales of Justice", on 30 April 1951.<sup>37</sup>

The relevant material in the Daube archive also makes clear that the creation of a Chair of Jurisprudence to accommodate the newcomer was part of a grand design for the Aberdeen Law Faculty under which it would be pre-dominantly staffed by full-time academics, rather than a handful of such persons (such as Smith himself) alongside several part-timers, principally local practitioners who would take time out to deliver lectures and other teaching at the University. The goal could produce tensions: a Smith letter in September 1950 refers to the unhappiness of Maurice Cramb, who had "been told that his services in Roman Law will not be required in 1951/52" as a result of Daube's appointment. The same letter notes a consequential "measure of unrest or disquietude among other part time lecturers".<sup>38</sup> Cramb was a partner in Cormack, Cramb & Gibb, Solicitors, Aberdeen, the firm which was also responsible for the administration of a student essay prize, the Hunter Gold Medal in Roman Law, while the university set the title.<sup>39</sup> Smith's ambition for a full-time team of academics emerges in a number of his letters to Daube. The correspondence refers

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<sup>33</sup> Cambridge University Archives, University/Min.V.128, papers of relevant dates.

<sup>34</sup> Letter 2.

<sup>35</sup> Letter 3.

<sup>36</sup> AUL, Acc 115, 4/97.

<sup>37</sup> The lecture was published: David Daube, *The Scales of Justice*, 63 JURIDICAL REVIEW 105-29 (1951).

<sup>38</sup> Letter 4.

<sup>39</sup> The evidence on this is a letter on firm notepaper from Cramb, dated 8 May 1951, concerned with the Hunter Gold Medal, found in AUL, Acc 115, 4/97. Cramb served Aberdeen University faithfully in many other capacities: see Aberdeen University Archival Database, reference [MS 3620/1/20](#).

to appointments at lecturer level, in particular Hamish (J. J.) Gow.<sup>40</sup> Of greatest significance to Daube personally was an assistant for him in his former Cambridge student, Peter Stein, who was appointed to Aberdeen in 1952 (although he did not arrive there until the summer of 1953, having first to fulfil a one-year appointment as an assistant at Nottingham).<sup>41</sup> Julius Fackenheim, who himself was another Jewish academic refugee from Nazi Germany, had been appointed to a part-time lectureship in Comparative Law in 1947, before Smith's arrival in Aberdeen.<sup>42</sup>

The scope of the new Chair extended to both jurisprudence, in the sense of philosophy of law, and Roman law. At Aberdeen, as at the other Scottish universities at the time, jurisprudence and Roman law were each subjects that could be taken as part of an Arts (M.A.) as well as of a Law (LL.B) degree. But the intending LL.B took a longer course in each subject and had to achieve higher marks for the pass to be counted towards that degree than was needed for the M.A. Additionally the LL.B could only be taken as a second degree, following upon the M.A, and was studied part-time while the student also undertook an apprenticeship in a practising solicitor's office. The degree process in Aberdeen took six years altogether, by contrast with the five years possible at Edinburgh. The common teaching ground between the two degrees provided a platform for thinking in Aberdeen, not only about the better integration of the M.A. and the LL.B in order to compete with Edinburgh for students, but also about the mutual stimulation for research that might exist between the humanities aspects of law and the arts disciplines, perhaps most notably the classics, philosophy and history. The Aberdeen Arts Faculty in 1951 possessed some outstanding scholars whose interests must have appealed to Daube, notably Peter Noble, Dean of Arts as well as Professor of Humanity, and Donald MacKinnon,

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<sup>40</sup> On James John Gow (1918-2009) see the obituary by William W. McBryde, SCOTS LAW TIMES (NEWS SECTION) 125 (2010). 'Hamish' is a common form of 'James' in Scottish speech, although also a forename in its own right. Another significant appointment in law, made in 1953, was Alexander Elder Anton (1922-2010), for whom see Paul R. Beaumont, *The Contribution of Alexander (Sandy) Anton to the Development of Private International Law* 51 JURIDICAL REVIEW 1-28 (2006).

<sup>41</sup> For the arrival of Peter Stein (b. 1926) in Aberdeen around June 1953, having spent most of the academic year 1952-53 as an assistant lecturer at Nottingham, see 35 ABERDEEN UNIVERSITY REVIEW 187 (1953). See also [http://www.squire.law.cam.ac.uk/eminent\\_scholars/professor\\_peter\\_stein.php](http://www.squire.law.cam.ac.uk/eminent_scholars/professor_peter_stein.php); <http://www.squire.law.cam.ac.uk/Media/Eminent%20Scholars%20Archive%20Transcripts/stein%20transcript%201.pdf>, questions 39-42; and <http://www.squire.law.cam.ac.uk/Media/Eminent%20Scholars%20Archive%20Transcripts/stein%20transcript%202.pdf>, questions 91 and 92 (interviews with Peter Stein).

<sup>42</sup> See JURISTS UPROOTED (note 4), 741, 772. T.B. Smith gives a slightly dismissive account of Fackenheim without naming him in *While One Hundred Remain: Scots Law, its Historical and Comparative Dimensions*, 171 ABERDEEN UNIVERSITY REVIEW 229-42, 232-3 (1984).

Regius Professor of Moral Philosophy.<sup>43</sup> As Daube arrived at the university, Smith as Dean of Law was circulating his Arts colleagues with proposals for as complete as possible an integration of jurisprudence and Roman law teaching between Arts and Law.<sup>44</sup> His scheme seems to have been successful, and also to have enabled the provision for LL.B students of what were called “Advanced” law courses, in which subjects that had been taken during a preceding M.A. could be studied in much greater depth for a full academic year.<sup>45</sup> Almost immediately Daube was involved in this, bringing forward with Smith’s advice and support proposals for courses in Advanced Jurisprudence and Advanced Roman Law, each to commence in the autumn of 1953.

The exchange between Daube and Smith on the Advanced courses may however hint at some difference between the two men on what the subject of Jurisprudence should involve. We see Smith pushing Daube to include in his reading lists texts written by English and Scottish legal theorists and suggesting that he “choose topics less closely identified with Roman Law” – for example, “modern Roman Catholic legal theory and [the] Soviet theory of law”.<sup>46</sup> Later on, when the two were corresponding about book purchases for the University Library, Smith wrote: “Remember also that Jurisprudence is your main commitment and Roman Law the second string – and there are many regrettable gaps in the Common Law side of Jurisprudence.”<sup>47</sup> He added later in the same letter:

Jurisprudence in Scotland has not had a reasonable exponent since Lorimer – and I look forward to his mantle falling upon the Prof of Jurisprudence at the

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<sup>43</sup> MacKinnon later wrote: “Daube’s presence in Aberdeen was an immense source of illumination in very many directions. His profound Jewish learning enabled him, for instance, to make, while he was amongst us, a permanently valuable contribution to the study of Christian origins in his seminal work – *The New Testament and Rabbinic Judaism*” (Donald M MacKinnon, *Memories of Aberdeen, 1947-60*, in ABERDEEN UNIVERSITY 1945-1981 (above, note 22) 15-18 (quotation at 17). The book referred to was published in 1956 by the Athlone Press, University of London, but originated as the Jordan Lectures in Comparative Religion given at the University of London in 1952. Daube’s book FORMS OF ROMAN LEGISLATION (1956) was also based upon a lecture given at University College London during his Aberdeen tenure.

<sup>44</sup> The memorandum is to be found in AUL, Acc 115, 4/97.

<sup>45</sup> Compare the entries for the Faculty of Law in the Aberdeen University Calendars for 1950-1951 and 1951-52. From the latter it can be seen that the University Senate passed the necessary resolution on 27 June 1951, and that this was approved by the University Court on 9 October 1951 (ABERDEEN UNIVERSITY CALENDAR 1951-52, 392 note 1).

<sup>46</sup> Letter 6. The first Calendar entry for the new course indicated that it would examine the Codex Juris Canonici and the Soviet Theory of Law (ABERDEEN UNIVERSITY CALENDAR 1951-52, 380).

<sup>47</sup> Letter 8.

University of Aberdeen. In some ways it is an even more deserving cause than R[oman]L[aw]. in which there are already many able persons at work. May you have the vigour to embark on a work on Jurisprudence for the Scottish student ... You are the one man I know who could tackle it. ... a feeding of starved student minds and the stocking of the empty cupboards of Scottish Jurisprudence.<sup>48</sup>

It was, however, never likely that a project couched in such terms would appeal to Daube, or that he would regard Roman Law as a second string to Jurisprudence. Bill Gordon, who was a law student at Aberdeen at the time, noted that his experience “was that Roman law was to [Daube] a subject in itself and was not to be regarded as a preparation for anything else”.<sup>49</sup> Professor Gordon also gave us a memorable picture of Daube’s “entirely different style” of teaching Jurisprudence by comparison with his Roman law course.<sup>50</sup> Where in the latter he extemporised from a few notes in relaxed but compelling fashion, in Jurisprudence “he came in with a fairly thick wad of notes closely typed ... delivered his lectures at some speed and one had the sense of a performance of duty rather than enjoyment.”<sup>51</sup> Professor Gordon further explained that, according to Peter Stein, Daube was in fact reading his own translation of Helmut Coing’s recently published *Grundzüge der Rechtsphilosophie* to the class.<sup>52</sup> Since however Coing was a strong opponent of the legal positivism that characterised contemporary jurisprudence in Britain and against which Lorimer in his time had also been active, Smith may not have been wholly displeased with the message the students received from Daube. Principal Taylor, as a practising Christian with a strong interest in natural law and criminal law as a tool of social control (perhaps reflecting five years as a High Court prosecutor between 1929 and 1934), would probably also have approved.<sup>53</sup>

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<sup>48</sup> Letter 8. For James Lorimer, who held the Regius Chair of Public Law and the Law of Nature and Nations at Edinburgh 1862-1890, see John W. Cairns, *Lorimer, James (1818–1890)*, ODNB [<http://www.oxforddnb.com/view/article/17016>, accessed 16 Aug 2012].

<sup>49</sup> William M. Gordon, *David’s Teaching in Aberdeen*, in DAVID DAUBE (note 3), 88-100 at 93.

<sup>50</sup> Gordon (note 49), 91.

<sup>51</sup> Gordon (note 49), 91-2.

<sup>52</sup> Gordon (note 49), 91; see Helmut Coing, *GRUNDZÜGE DER RECHTSPHILOSOPHIE* (1950).

<sup>53</sup> See Taylor’s published writings: *THE DISCIPLINE OF VIRTUE: REFLECTIONS ON LAW AND LIBERTY*, 26th Riddell Memorial Lectures, University of Durham (1954); *WHERE ONE MAN STANDS* (1960) (a collection of sermons); *CHRISTIANS AND THE PREVENTION OF WAR IN AN ATOMIC AGE: A THEOLOGICAL DISCUSSION* (1961); and *SPEAKING TO GRADUATES* (1965) (a posthumous collection of his Aberdeen graduation addresses 1947-1962, with a biographical memoir). See also James Chalmers,

There is however no sign in the correspondence I have seen that Smith attempted to influence Daube's Roman law teaching so that the subject's contribution to the development of Scots law was highlighted for the students. For the Advanced class, which was to focus on the Roman law of sale, Smith encouraged use of the class library grant to buy second-hand copies of a text on the subject published in 1907 written by a former Edinburgh Professor of Civil Law (James Mackintosh) and including references to modern material such as the U.K. Sale of Goods Act 1893;<sup>54</sup> but this seems to reflect more buying in what would be relatively readily available in Scotland than pressure to use the Roman material to discuss Scots law. Smith also encouraged the purchase for the library of de Zulueta's much more recently published (1945) book on the Roman law of sale, which of course made no reference to Scots law at all.<sup>55</sup> Bill Gordon's recollection was that "David did not treat the class of Roman Law as a preparation for the study of Scots law"; as he pointed out, that was "certainly not the sort of approach which would have accorded with his experience of Roman law either in Germany or Cambridge."<sup>56</sup> The students were left to make their own connections, for example in the Hunter Gold Medal essay competitions if the set topic was one in which the Roman law had influenced the Scots.<sup>57</sup> Again, all this may have mattered less to Smith than it might have done later in his career, since at this time he contemplated introducing his own set of lectures on Scottish legal history as a supplement to the class of Constitutional Law and History (another of the courses which could count in both Arts and Law).<sup>58</sup>

There are signs, however, that Smith attempted more generally to interest Daube in Scots law and its history and to involve him in the Scottish legal community. Daube responded at least to some degree. His inaugural lecture

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*Thomas Taylor's Lectures on Criminal Law*, in MISCELLANY V, Stair Society vol 52 (Hector L. MacQueen, ed, 2006), 189-241.

<sup>54</sup> Letter 6.

<sup>55</sup> Letter 6.

<sup>56</sup> Gordon (note 49), 93. Daube's Advanced Roman Law course focused on sale: see Ernest Metzger, *Remarks on David Daube's Lectures on Sale, with Special Attention to the liber homo and res extra commercium*, in DAVID DAUBE (note 3), 101-126. See also Gordon (note 48), 89, 98-9. Stein (note 4), 434-5, suggests that Daube's teaching on sale bore fruit in various articles on the subject published in the later 1950s.

<sup>57</sup> See Letters 9, 11 and 12.

<sup>58</sup> Letter 5. See also Smith's memorandum on the academic implications of Daube's arrival (above, note 44 and accompanying text).

contained a number of glancing references to Scots law, at least one of which was owed to Smith.<sup>59</sup> To mark the occasion of the inaugural the Smiths gave him a copy of Sir John Skene's 1609 Scots language edition of medieval law texts entitled *Regiam Majestatem*.<sup>60</sup> The lecture itself was quickly published in the *Juridical Review*, the leading (indeed, at the time, the only) academic law journal published in Scotland, and Daube soon placed a further article there as well as another in the *Aberdeen University Review*.<sup>61</sup> He also undertook some book reviews for the *Juridical* and took the opportunity in one to show off some knowledge of one aspect of Scots law drawn from its Civilian heritage.<sup>62</sup> Later Smith besought Daube to join the Stair Society, the Scottish legal history publishing society; but not, it seems, with any success.<sup>63</sup>

Daube's Aberdeen file contains a copy of a letter, dated 16 May 1951, sent by him to Lord President Cooper, the head of the Scottish judiciary, strong proponent of Scottish legal history, and an inspiration for Smith.<sup>64</sup> This was clearly an early step in a project to explore the Roman law and Civilian holdings of the Advocates Library in Edinburgh. Daube wrote:

Roman law could be a real link between the law faculties of this country and those of the rest of Western Europe. It may yet, as you suggest in Harvard Law Review, acquire some importance in its own right in Anglo-Saxon countries. To train and maintain a group of experts here who can talk the language of their continental colleagues, and whose standard will be equal to the continental, free access to modern literature is indispensable.<sup>65</sup>

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<sup>59</sup> Daube, *Scales of Justice* (above, note 37), 110 note 5 (acknowledging Smith), 111, 112, 113, 126, 127-128. He also cited (at id, 128) William W. Buckland, *Casus and Frustration in Roman and Common Law* 46 HARVARD L.R. 1281 (1933), an article making considerable reference to the influence of Roman law in Scots law.

<sup>60</sup> AUL call number (provisional) Daube 1609 Reg.

<sup>61</sup> See above note 37 for the inaugural's publication; also *Slave-catching*, 64 JURIDICAL REVIEW 12-28 (1952); *The Date of the Birth of Merlin*, 35 ABERDEEN UNIVERSITY REVIEW 49-50, addendum at 147 (1953-54).

<sup>62</sup> For references see Appendix, Letter 8, note 151; and Letter 11 (note 161). A further review appeared in 65 JURIDICAL REVIEW 101 (1953) (also published in 35 ABERDEEN UNIVERSITY REVIEW 59 (1953-54)).

<sup>63</sup> Letter 12, postscript.

<sup>64</sup> AUL, Acc 60, 4/97; see on the Smith-Cooper relationship Hector L. MacQueen, *Two Toms and an Ideology for Scots Law: T. B. Smith and Lord Cooper of Culross*, in MIXED LEGAL SYSTEM IN TRANSITION (note 8), 44-72.

<sup>65</sup> The reference is to Lord Cooper, *The Common and the Civil Law – A Scot's View*, 63 HARVARD L.R. 468 (1950).

Daube subsequently received a letter (dated 24 May 1951) from David Walker, then an advocate who was preparing a catalogue of the Civilian holdings in the Advocates Library, and who had been prompted by Lord Cooper to write and seek Daube's advice as well as inviting him to visit the Library – an invitation that was no doubt taken up.<sup>66</sup> But Daube's interest was in the professionalisation and advance to European standards of Roman law studies in Britain, not the re-Civilianisation of Scots law, and no further engagement with the Advocates Library has been noted from the archive.

Books on Roman law and their availability in Aberdeen was clearly an issue from the start of Daube's tenure of the Chair of Jurisprudence, and one in which he enjoyed the full support and practical advice of his Dean. Smith provided local knowledge on how to obtain and best deploy the funds available from the University and other sources, and helped gain the support of Principal Taylor as well as the redoubtable University Librarian, W. Douglas Simpson.<sup>67</sup> A breakthrough appeared early in 1952, probably thanks to what must have initially seemed a disaster for the whole project of the Chair of Jurisprudence. Daube's first prolonged encounter with Aberdeen's winter climate appears to have caused serious problems with his chronic asthma, ultimately compelling him to go to the Primrose Clinique in Montana-Vermala, Switzerland, for prolonged treatment there lasting until the spring of 1952.<sup>68</sup> This however may have provided him with an opportunity to meet (if he did not already know him) Hans Lewald, a German who, although not Jewish, had removed himself from Nazi Germany in 1935 to become Professor of Roman Law at Basle.<sup>69</sup> Lewald was due to retire in 1953 and if, as seems probable, he was the man of that name referred to in the Smith-Daube correspondence during the latter's Swiss exile, it seems that he was willing to sell at least part of his Roman law library to Aberdeen.

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<sup>66</sup> Walker became Professor of Jurisprudence at Glasgow University in 1954, moving on to succeed Andrew Dewar Gibb in the University's Regius Chair of Law in 1958: see David M. Walker, *A HISTORY OF THE SCHOOL OF LAW, THE UNIVERSITY OF GLASGOW* (1990), 58, 73.

<sup>67</sup> Letters 6, 8 and 10.

<sup>68</sup> Stein (note 3), 434; Letters 7-12.

<sup>69</sup> On Lewald see *JURISTS UPROOTED* (note 4), 48, 52, 64, 303, 453-4; Axel Flessner, *Hans Lewald (1883-1963)*, in *JURISTEN AN DER UNIVERSITÄT FRANKFURT AM MAIN* (Bernhard Diestelkamp and Michael Stolleis, eds., 1989), 128-35 (with photograph).



The ultimate solution to the books problem – Aberdeen’s purchase of de Zulueta’s library for the knockdown price of £300 – seems to have emerged not long after Daube’s return to the University. On 26 November 1952 the minutes of the Aberdeen Senatus record an agreement between the University and de Zulueta for the purchase of “his library of books on Jurisprudence and Roman Law at a low price”, while on 20 December 1952 Principal Taylor could report to its General Council that “in recent months our Library has been greatly enriched on the side of Jurisprudence and Roman Law by the acquisition of part of the library of Professor de Zulueta”.<sup>70</sup> I have found nothing in the Daube archive on how this came about, but it may well have been something of a joint operation which cemented the mutual goodwill of Daube and Smith, since both men had powerful links with de Zulueta.<sup>71</sup> Both Rodger and Carmichael highlight the esteem in which Daube held de Zulueta.<sup>72</sup> They first met in Oxford in the 1930s, when Daube discovered that de Zulueta’s Spanish origins led him to sympathise with Franco’s brand of fascism. But some anti-semitic attitudes did not prevent him rendering much support to Jewish refugees from Nazi Germany and, subsequently, to Polish exiles as well.<sup>73</sup> Later, Daube believed that de Zulueta had recommended his name to the Prime Minister to fill the Oxford Regius Chair of Civil Law in 1955. The laureation at the Aberdeen graduation of 10 July 1953 where the honorary degree of LL.D was conferred upon de Zulueta by a grateful University was delivered by Smith.<sup>74</sup> He had been a student under de Zulueta in the 1930s at Oxford. There is, however, no contribution from T. B. Smith to the memorial volume, *Studies in the Roman Law of Sale*, edited by Daube and published in 1959 after de Zulueta’s death the previous year. This is probably because the

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<sup>70</sup> Aberdeen University Library MS 2785/4, Senatus Meeting 26 November 1952; *Principal’s Report to General Council on the State of the University, delivered on 20 December 1952*, 35 ABERDEEN UNIVERSITY REVIEW 178, 179 (1953). See also a note in SCOTS LAW TIMES (NEWS SECTION) 248 (1952), giving details of the collection’s contents. Further on the collection see Gero Dolezalek, BOOKS AND PAPERS OF THE LATE FRANCIS DE ZULUETA (1878-1958): REGIUS PROFESSOR OF LAW AT OXFORD 1919-1948 (1996), Aberdeen University Law Library, Ref 340.54 Dol.

<sup>71</sup> It may also have helped that, according to the ODNB (note 10), de Zulueta’s father was of Scottish descent in the female line from Brodie M’Ghie Willcox, one of the founders of the P & O Steam Navigation Company. In Smith (note 42), 235, he says that during his time as Dean the library of another of his Oxford professors, R. W. Lee, also found its way to the Aberdeen Law Library. I have not been able to confirm this.

<sup>72</sup> Rodger, ZSSR (note 4), XXVII; Carmichael, IDEAS AND THE MAN (note 4), 95-96.

<sup>73</sup> See Calum Carmichael, THE JOTTINGS OF DAVID DAUBE: REFLECTIONS FROM THE TWENTIETH CENTURY BY ONE OF ITS FOREMOST LEGAL MINDS (2007), No. 50.

<sup>74</sup> 35 ABERDEEN UNIVERSITY REVIEW 295-6 (1953).

volume was a collection of specialist studies in classical Roman law. Instead, Smith dedicated to de Zulueta's memory a 1959 article in the *Tulane Law Review*, entitled "Meditation on Scottish Universities and the Civil Law". He wrote there of the "memories, regrets, gratitude and hope" he owed to his former teacher.<sup>75</sup>

Daube's illness and consequent absence from Aberdeen in the winter of 1951-52 may explain Bill Gordon's impression when he took the Ordinary Roman Law class in 1952-53 that he and his fellow-students were the first to be taught by the Professor.<sup>76</sup> But Daube does seem at least to have started the lectures in 1951-52, since a letter to him in Switzerland from Julius Fackenheim dated 30 January 1952<sup>77</sup> shows that the latter had taken over the Roman Law lectures but only after they had begun:

Following your suggestions, I finished first the Law of Property, Donatio, ownership in suspense, common ownership, personal servitude, praedial servitudes: part of this were some explanations on emphyteusis and superficies. After this, finishing the law of property, I proceeded to the law of obligations, but feeling it would perhaps be wise to have two concurring subjects, I started now the law of procedure.

Fackenheim goes on to give a picture of the students and, unconsciously perhaps, their teacher:

The class is very attentive, and I have, I hope, succeeded in creating a somewhat friendly atmosphere so that there should not be that gap between lecturer and audience which you unfortunately find so often. It seems that some of the students are not – or at least no longer – so well acquainted with Latin as would be desirable. In the desire to cover as much as possible as long as I have the pleasure of helping in the course, I went on a little quickly so that, realising this, I had to slow down recently. It is therefore too early to say how much I may be able to cover in the time at my disposal, but I shall certainly do my best.

Daube had probably also been engaged in at least the initial steps of organising part of what was evidently a highlight of early 1952 for the Aberdeen Law

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<sup>75</sup> T. B. Smith, *Meditation on Scottish Universities and the Civil Law* 33 TULANE L.R. 621 (1959).

<sup>76</sup> Gordon (note 49), 89.

<sup>77</sup> Found out of its alphabetical place in AUL, Acc 60, 7/253.

Faculty: the visits to the Faculty of two eminent foreign scholars in Wolfgang Kunkel (1902-1981) and Albert Ehrenzweig (1906-1974). Kunkel's connection to Daube was fundamental: he had supervised Daube's studies at Göttingen in 1931-32 as well as being, like him, a pupil of Otto Lenel.<sup>78</sup> Kunkel was not Jewish but his record in German academic and legal life during the period 1933-1945 was one of courageous protest and resistance against Nazi anti-semitism and subversion of the rule of law.<sup>79</sup> Ehrenzweig on the other hand was Jewish, and from Austria rather than Germany; but like Daube he had been forced to flee his native land after the *Anschluss* in 1938. After various academic peregrinations, including a period studying in Bristol in England, he settled at the law school of the University of California at Berkeley in the USA in 1948. There he had already become internationally eminent in tort law, conflicts of laws and jurisprudence (later, he was to coin the idea of "psychological jurisprudence").<sup>80</sup> Smith however probably played the leading part in attracting Ehrenzweig to Aberdeen. The evidence for this is in an article by Ehrenzweig published in the *Juridical Review* for 1951, and entitled "Alternative actionability in the conflict of laws of enterprise liability: an American comment on M'Elroy's

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<sup>78</sup> See Stein (note 4), 430; Rodger ZSSR (note 4), XV-XVI.

<sup>79</sup> JURISTS UPROOTED (note 4), 49. Some of this comes through in Daube's later contribution to a volume in honour of Kunkel: *A Corrupt Judge Sets the Pace*, in GEDÄCHTNISSCHRIFT FÜR WOLFGANG KUNKEL (Dieter Nörr and Dieter Simon, eds., 1987), 37-52. Daube sent Smith a photocopy of this article. The Gedächtnisschrift also contains a memoir of Kunkel by Dieter Nörr (id., 9-24). See further on Kunkel's career Helmut Coing, *In memoriam Wolfgang Kunkel*, 98 ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE. ROMANISTISCHE ABTEILUNG III-XVI (1981); Fritz Sturm, *Wolfgang Kunkel zum Gedächtnis* 25/26 BULLETTINO DELL'ISTITUTO DI DIRITTO ROMANO, 17-35 (1984). Kunkel paid at least one more visit to Aberdeen: see Gordon (note 49), at 98; THE JOURNAL OF SIR RANDALL PHILIP, OBE, QC: PUBLIC AND PRIVATE LIFE IN SCOTLAND 1947-57 (Fiona Craddock, ed., 1998), at 483.

<sup>80</sup> On Ehrenzweig see Friedrich Kessler, *Gedanken bei der Lektüre von Albert A. Ehrenzweigs Psychoanalytische Rechtswissenschaft*, and Vera Bolgár, *Albert A. Ehrenzweig – Kurt H. Nadelmann – Stefan A. Riesenfeld*, both in DER EINFLUSS DEUTSCHER EMIGRANTEN AUF DIE RECHTSENTWICKLUNG IN DEN USA UND IN DEUTSCHLAND (Marcus Lutter, Ernst C. Stiefel and Michael H. Hoeflich, eds, 1993), 281-285, 95-105 respectively; Ernst C. Stiefel and Frank Mecklenburg, DEUTSCHE JURISTEN IM AMERIKANISCHEN EXIL (1933-1950) (1991), 57-9; Horst Göppinger, JURISTEN JÜDISCHER ABSTAMMUNG IM 'DRITTEN REICH' (1990), 276, 333; Gabriele Hessel, ALBERT A. EHRENZWEIG'S KOLLISIONRECHTLICHE LEHREN: PERSON UND WERK (1990); ALBERT A. EHRENZWEIG UND DAS INTERNATIONALE PRIVATRECHT (Rolf Serick, Hubert Niederländer and Erik Jayme, eds, 1986). See further the brief biography at 54(4) CALIFORNIA L.R. 1419-21, with bibliography 1638-48 (1966), a special issue in Ehrenzweig's honour to which Hans Kelsen (under whom he had been a student in Vienna) and Daube (by this time a regular visitor to Berkeley) were contributors; also the memorial with additional bibliography in 62(4) CALIFORNIA L.R. 1069-83 (1974). Ehrenzweig's tribute to Kelsen, who likewise ended his career at Berkeley, is in 59(3) CALIFORNIA L.R. 609-11 (1971), prefacing a special issue in Kelsen's honour to which Daube (by now a colleague of both men) was again a contributor.

Case”.<sup>81</sup> This has appended to it a further note by Smith, explaining inter alia that the two men had been in correspondence on the topic, focussed on the then recent Scottish case of *M’Elroy v M’Allister*.<sup>82</sup> Who had initiated the correspondence is not stated; but Ehrenzweig’s Aberdeen trip must have been one further upshot. Smith’s letters to the absent Daube about the visit show how much effort he put into it, not least by associating it with the launch of the Aberdeen University Law Society at a dinner held during the academic visits.<sup>83</sup> The correspondence also shows Smith seeking to link Scots law and the Scottish legal system with the outside world but unfortunately in the process managing to fall out again with at least some elements in the local Aberdeen profession. The handwriting and emotion of the letter in which he narrates the course of events to Daube shows the stress this placed upon him, as well as the trust he had to share it with his absent friend.

A further cause of stress, probably for both men, was the failure of another initiative narrated in the letter, an unsuccessful attempt to have an honorary LLD awarded to the distinguished Italian Romanist, Edoardo Volterra (1904-1984).<sup>84</sup> Quite apart from his considerable scholarship in Roman and other ancient laws, including ancient Jewish law, Volterra was clearly more than worthy of the honour proposed. As a Jew himself, he had been deprived of his chair at Bologna in 1938 following the passage of anti-Jewish legislation by Mussolini’s fascist regime in Italy,<sup>85</sup> and had spent some years in exile in France and Belgium. But he had returned to Italy in 1943, to become one of the leaders of Italian armed resistance to fascism during the Second World War, as a founder member of the Partito d’Azione, an

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<sup>81</sup> Albert A. Ehrenzweig, *Alternative Actionability in the Conflict of Laws of Enterprise Liability: an American Comment on M’Elroy’s Case*, 63 JURIDICAL REVIEW 39 (1951).

<sup>82</sup> *M’Elroy v M’Allister* 1949 S.C. 110.

<sup>83</sup> The dinner was however a success in the eyes of Smith’s friend and mentor in the Faculty of Advocates, Randall Philip: see PHILIP JOURNAL (note 79), 267-8.

<sup>84</sup> See the entry for Volterra in L’ENCICLOPEDIA ITALIA TRECCANI (<http://www.treccani.it/enciclopedia/edoardo-volterra/>) and Douglas J. Osler, BIBLIOGRAPHICA IURIDICA 3: EDOARDO VOLTERRA 1904-1984 (2006). A Google search on Volterra’s name throws up numerous other references, mainly on Italian websites, from which the basic story of his career can be readily pieced together. I am grateful to Pierre de Gioia-Carabellese for help with the Italian material. See further STUDI IN ONORE DI EDOARDO VOLTERRA, 6 volumes (Luigi Aru and others, eds., 1971): Daube’s contribution, *To Be Found Doing Wrong*, is on Biblical law and is to be found in volume 2 of the STUDI at 1-13. Daube’s pupils Bill Gordon, Peter Stein, Tony Thomas, Reuven Yaron and Alan Watson are also contributors to the collection. Note too the Projet Volterra based at University College London, named for Volterra, which promotes the study of Roman law in its full social, political and legal context (see <http://www.ucl.ac.uk/history2/volterra/>).

<sup>85</sup> On this see Cristina M. Bettin, ITALIAN JEWS FROM EMANCIPATION TO THE RACIAL LAWS (2010).

underground paramilitary anti-fascist organisation.<sup>86</sup> After the war he resumed his scholarly activities, returning to his chair at Bologna before moving to Rome in 1951. It seems certain that Daube had met Volterra at latest when he visited Cambridge to give a guest lecture in May 1948.<sup>87</sup> His personal history as well as his academic interests must have commended him to Daube, while his war record would have added to his attractions for Smith. A consequent sense of shame at the failure of the nomination to succeed before the relevant Aberdeen committee probably underpinned Smith's quixotic effort, made against the advice of more seasoned colleagues, to have the committee's decision reversed in the University Senate.<sup>88</sup>

The need to engage with the University's bureaucracy in detail in order to get conditions right for both teaching and research; the finding of his feet in Scotland as well as Aberdeen; and finally his illness, made 1951 a difficult year for Daube. Yet the constant support and advice provided by Smith at this time must have been a reminder for Daube of the way in which he had been cared for by others at critical moments in the past, notably Otto Lenel, Buckland and his daughter. They go a long way to explaining the loyalty and affection which he ever after displayed to his former colleague. It is also very clear that Smith remained conscious of the significance of what had happened to the Jews in Europe between 1933 and 1945, and so far as he could, recognised the need for some form of atonement (and not just from Germany). This is manifest in the invitations to Kunkel and Ehrenzweig as well as the unsuccessful nomination of Volterra for an honorary degree. Further, however, he and Daube also agreed on such emotive issues as the post-War Nuremberg trials and the trial and execution of William Joyce ("Lord Haw-Haw") in 1946.<sup>89</sup> Neither was attracted by the spirit of revenge, or of trading wrong for wrong; instead there was mutual sympathy and understanding on some fundamental matters, never, perhaps, put fully into words on either side.

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<sup>86</sup> The Partito d'Azione, which represented a secular, middle-class, "liberal" tradition, is seen today as one of the main three putative "fathers" of the modern Italian Constitution, together with the Socialist Party and the Catholic Party.

<sup>87</sup> See Edoardo Volterra, *Western Postclassical Schools*, 10 CAMBRIDGE L.J. 196-207 (1949).

<sup>88</sup> Letter 8.

<sup>89</sup> See Letter 1, below. Smith's views on Nuremberg are apparent in his review of Andrew Dewar Gibb, *PERJURY UNLIMITED: A MONOGRAPH ON NUREMBERG* (1954), published in 67 JURIDICAL REVIEW 329 (1955). See also on Joyce later works of T. B. Smith: (1) *BRITISH JUSTICE: THE SCOTTISH CONTRIBUTION* (1961), 65; (2) *A SHORT COMMENTARY ON THE LAW OF SCOTLAND* (1962), 127 note 60, 175-6.

The later material in the Daube archive shows Smith offering to put him up when he came to Edinburgh to give the Gifford Lectures in 1963, and gracefully acknowledging congratulations on his appointments, first to the Chair of Scots Law at Edinburgh in 1968, and then as a full-time Law Commissioner in 1972. Smith as Commissioner also sought Daube's advice on points of Biblical law when the Scottish Law Commission reviewed the criminal law of incest (then based on chapter 18 of Leviticus in Scotland). There is also extensive correspondence making arrangements for a trip to California by the Smiths early in March 1975. It begins with a letter from Smith to Daube dated 16 May 1974 announcing a pending visit to Louisiana to deliver a Tucker Lecture at Baton Rouge, i.e. at the Louisiana State University, and to be a scholar in residence there for two weeks.<sup>90</sup> The Smiths eventually stayed at the Berkeley Faculty Club as Daube's guests from 6-9 March 1975 following the fortnight in Baton Rouge. Ann Smith gave a lecture to the Berkeley faculty on female criminality and Daube hosted a lunch in the couple's honour in the Faculty Club for around 20 persons. It was this enjoyable visit which prompted Daube's subsequent letter to the Smiths (printed in my previous article on the Daube-Smith friendship) announcing the discovery of "that *rara avis*", a native-born Scottish saint.<sup>91</sup> The archive also contains a copy of a much sadder letter that Daube sent to the Smiths in December 1976, offering short but beautifully expressed condolences on the recent death of their daughter Jenefer. This came after her long struggle with debilitating diabetes, which had been referred to in previous correspondence stretching back as far as April 1968. Daube must also have been aware that this was the second such blow for the Smiths whose son Roderick died suddenly of a brain haemorrhage in 1962.<sup>92</sup>

We can therefore appreciate the alacrity with which Daube responded to an invitation in December 1979 to contribute to an issue of the *Juridical Review* in honour of Smith:

Dear Dr Leslie<sup>93</sup>

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<sup>90</sup> Smith's Tucker Lecture is published as *Law Reform in a Mixed 'Civil Law' and 'Common Law' Jurisdiction*, 35 LOUISIANA L.R. 927-63 (1974-75).

<sup>91</sup> MacQueen (note 3), 31-2.

<sup>92</sup> All correspondence referred to in this paragraph (with the exception of the 1975 letter on the native-born Scottish saint) is to be found in AUL, Acc 60, 7/253.

<sup>93</sup> My former Edinburgh colleague Dr Robert Leslie of the Faculty of Law, University of Edinburgh, organised and edited the special issue of the *Juridical Review* in Smith's honour.

I have this moment received your invitation to contribute to a T.B. Smith volume and I hasten to accept. It will be an enormous pleasure to show my admiration and affection for this old friend of mine. I am most grateful to you. And when Daube submitted his contribution in July 1981, he wrote:

Dear Dr Leslie

Herewith my T.B. Smith paper.

May I request that no changes, however minor, be made without my consent; and also I should like to see a proof before publication. I never make changes at the proof-stage, but I wish to make sure there are no misprints. It would put my mind at rest if you dropped me a p.c. confirming receipt of the typescript.

I am very happy to contribute to this volume and want everything o.k.<sup>94</sup>

Daube was of course an emotional man, and generous to his friends, but it seems impossible to read these short notes, and the resultant article, as an expression of anything than deep personal regard, indeed love, for Smith and his wife that stretched back over many years. I have already quoted from the opening paragraph of the contribution itself, but it seems worthwhile to give the remainder as well:

To contribute to a volume in honour of T. B. Smith is a high privilege. Our association dates from the early fifties when I joined the Aberdeen Law Faculty under his energetic, purposeful and visionary Deanship. But he did not give only as a scholar. ... I am deeply grateful for those years and the continued friendship since. If the following note is rather esoteric, Tom and Ann have such wide interests, both academic and in the world of affairs, that it is bound to touch on some of them.<sup>95</sup>

Smith's response, in a letter of thanks "for a splendid and much appreciated paper", written in September 1982 after the article's publication, is also typical:

I was indeed most interested in your article on Ahab and Benhadad, which, as so often in your writings – casts a beam of revealing light on problems which have baffled the sages until you clarified the problems. Moreover, the 'shame factor' had a very special interest for me in the context of my last phase at the Scottish Law Commission. When Lord Hunter was landed with the Ross Murder Inquiry for nearly 5 years, I had to discharge most of his duties as

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<sup>94</sup> The letters to Dr Leslie may be found in AUL, Acc 60, 7/253.

<sup>95</sup> *Ahab and Benhadad: a Municipal Directive in International Relations*, 27 JURIDICAL REVIEW 62(1982) 62 (ellipsis for passage already quoted above, 000 at note 31).

Chairman of the Commission, and we had to concentrate mainly on the uncongenial topics of Bankruptcy and Diligence (anglicè ‘execution of judgments’). Clearly there was enormous resentment at the humiliation of the selling up – as a last resort – of the personal effects of a debtor at his own dwelling and observed by his neighbours. We recommended many changes in the present law of diligence – including, wherever possible, warrant sales at public auction rooms rather than at the debtor’s home.<sup>96</sup>

I have suggested elsewhere the significance of the Daube friendship for Smith as the latter carried forward the project to develop the law school at Aberdeen:

[C]ontact with the much longer-established scholar must have had some influence in shaping Smith’s ambition and sense of the possible in academic life. Here was a man who was publishing more in Italy, France and Germany than in the United Kingdom, across a huge range of subjects and, indeed, disciplines. In a number of publications Alan Rodger has argued for the significance of Daube’s example, not only in the development of Roman law studies in Britain after the Second World War, but in the raising of standards generally in British academic law in that period. T. B. Smith was to be the standard-bearer in this regard in Scotland, and perhaps we should see Daube as the exemplar which Smith had most immediately before him in those formative years at Aberdeen when he developed his credo and the mission upon which that set him for the rest of his career.<sup>97</sup>

But the significance of the Aberdeen experiment went much further than the expansion of Smith’s own career. Ten years after Daube’s appointment the Scottish LL.B became a full-time, undergraduate degree of four years’ duration, including the possibility of “Honours” study for which Aberdeen’s Advanced courses had blazed the trail. The degree ceased simply to be an adjunct to professional training, while the teachers increasingly became also researchers whose horizons were not confined by the needs of either their students or the Scottish legal profession. International standards were brought to bear in Scottish law schools, while the professors of Scots law looked more and more to bring their subject before an international audience. The price that had to be paid was Law becoming a first degree, with no requirement of a prior Arts degree; and so to a considerable extent the promising link between

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<sup>96</sup> Found in AUL, Acc 60, 7/253.

<sup>97</sup> MacQueen (note 3), 21-2 (and see the works of Rodger referred to in note 4).



legal studies and other humanities disciplines initiated at Aberdeen did not mature as it might have done. But Peter Stein, Daube's successor in the Chair of Jurisprudence between 1955 and 1968, came much closer than his master to fulfilling the Smith vision of what might be achieved in that Chair, showing that such work was indeed compatible with serious scholarship of the highest quality.<sup>98</sup>

Yet in the end the strongest impression from this study in the Daube archive is of a personal bond between two scholars who academically and personally could scarcely have been more different. Where Daube eschewed generalisations and worked close to his texts without concern for "relevance" to anyone else, Smith ranged widely and sought to set agenda, not only for research but also for action beyond the sphere of the academy. Where Daube avoided conflict and wished simply to pursue his scholarship, Smith was, in his own words, "turbulent"<sup>99</sup> and could not resist taking up challenges from elsewhere. In the long run, Daube became a hippie while Smith remained a soldier. Yet what they had in common was a sense of justice coupled with what today we might call "emotional intelligence": sympathy, or empathy, or engagement, with the people who were close to them professionally as well as personally. Loyalty and reciprocity seem to have been crucial to them both. Smith served Daube well in Aberdeen; and he may well have felt fully repaid later in a life far from free of pain and difficulties. The friendship was thus indeed good and rich; and in its own way it also played a part in setting law in Scotland on to a new path, the destination of which, however, has yet to become completely clear.

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<sup>98</sup> See for example the following works by Peter Stein, many products of his Aberdeen period: *FAULT IN THE FORMATION OF CONTRACT IN ROMAN LAW AND SCOTS LAW* (1958); *The General Notions of Contract and Property in Eighteenth Century Scottish Thought*, 8 *JURIDICAL REVIEW* 1-13 (1963); *The Source of the Romano-canonical Part of Regiam Majestatem*, 48 *SCOTTISH HISTORICAL REVIEW* 107 (1969); and chapters 18-22 in his collected papers, *THE CHARACTER AND INFLUENCE OF THE ROMAN CIVIL LAW: HISTORICAL ESSAYS* (1988).

<sup>99</sup> See Letter 10 below.

## APPENDIX

### LETTER 1<sup>100</sup>

Gonville & Caius College

Cambridge

24<sup>th</sup> March 1950

Dear Professor Smith

Many thanks for your letter, and the cutting, which is indeed not quite fair to me. But I am sure they meant well.<sup>101</sup>

In the meantime I have read ‘Severalty of Administration of Justice’, which impresses me as a model of elegant writing.<sup>102</sup> I am lending my copy to Smoira, President of the Supreme Court of Israel (and a competent Roman lawyer).<sup>103</sup> The problem they have to face in the new state is not dissimilar, and I think your balanced statement will help them in finding a course which will avoid both the danger of chauvinism and that of slavish imitation. Incidentally, I am one of those who did not like the conviction of Joyce.<sup>104</sup>

I have written to Wade<sup>105</sup> – who is at present at Sawston – asking him whether the presence of an Assessor at an Examiners’ Meeting is genuinely welcome. I shall let you know his answer, but even if it were negative (which would greatly surprise me) it would be no reason why you should not come to Cambridge any time during the summer, stay with us and meet a few nice friends.

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<sup>100</sup> AUL, Acc 115, 57/97.

<sup>101</sup> I have found nothing further to explain what the “cutting” (presumably from a newspaper or journal) may have been or to what it referred. But it may well be still preserved in Daube’s archive, which includes a mass of such cuttings.

<sup>102</sup> This must have been an offprint of Smith’s inaugural lecture, delivered in Aberdeen on 20 April 1949 and published as *Severalty of Administration of Justice in the United Kingdom* 61 JURIDICAL REVIEW 151 (1949).

<sup>103</sup> Moshe Smoira was the first President of the Israeli Supreme Court, holding office from 1948 to 1954.

<sup>104</sup> The conviction and execution of William Joyce (“Lord Haw Haw”) in 1946 for treason although he was not a British citizen had caused widespread debate to which Smith’s inaugural lecture (above note 102) referred at 163. See further above, 000.

<sup>105</sup> Emlyn Capel Stewart Wade, Downing Professor of the Laws of England at Cambridge 1945-1962. Wade was Chairman of the Board of Examiners in the Cambridge Faculty 1947-49 and so also Chairman of the Faculty (J. H. B[aker], 750 YEARS OF LAW AT CAMBRIDGE (1996), 24).

Yesterday Patrick Duff<sup>106</sup> came to discuss my future. Here are the three main conclusions that emerged.

- (1) As for a Readership here I can be sure of getting one, if not before October, at any rate in the near future. It would be £1600, so that with supervisions etc, financially, there would be no difference between it and a Chair at Aberdeen.<sup>107</sup>
- (2) However, I should prefer a Chair at Aberdeen to a Readership, or Chair, anywhere else. From the first moment I loved the atmosphere of the place; and I was tremendously impressed by the presence of a genuine interest in jurisprudence as a branch of the humanities. To help forging solid links between law, history, classics and divinity would be a task that would give me immense satisfaction.
- (3) My difficulty is that my negotiations with Jerusalem – who offered me a Chair of Roman Law as long ago as last year – are so advanced that I must accept or decline within the next three weeks or so. If I could go to Aberdeen now, things would be easy. But as the Chair will not be in existence before next year, is it not a risk to decline Jerusalem? Would you be so good as to tell me what you feel about this – the crucial point? Is there any way of giving me certainty, say, by a preliminary resolution? Perhaps you have already passed it, only I do not know.

I have asked Duff to treat the Aberdeen matter as confidential. But I am glad you allowed me to talk it over with him, one of my closest friends.

I think I had better postpone writing to the Principal<sup>108</sup> on these questions until I have had your reply. But, of course, you may shew<sup>109</sup> him this letter if you like.

Please remember me to your wife, your children and Miss Zurich.

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<sup>106</sup> Professor of Civil Law at Cambridge 1946-1968. See above, 000. Duff was Chairman of Examiners and Faculty at Cambridge 1949-1952 (Baker (note 105), 24).

<sup>107</sup> A pencilled marginal note, probably written by Daube himself, alongside the main text of this copy letter, suggests the prospective income amounts to £2000.

<sup>108</sup> i.e. T. M. Taylor, Principal of Aberdeen University, for whom see above, 000.

<sup>109</sup> Peter Stein (note 4), 435, and Jonathan Daube (note 6), 166, have noted the favouring of this old-fashioned spelling because it was Buckland's.

With kindest regards,

Yours sincerely

David Daube.

## LETTER 2<sup>110</sup>

33 Queen's Road

Aberdeen

27 June 1950

My dear Daube

I am sorry about the delay in replying. I have been in Edinburgh, and am just back for orals and a Senatus meeting. Then I must start on piles of Edinburgh papers – and go to Edinburgh again on Sunday for orals there on Monday and Tuesday. Frankly I feel rather decayed just at the moment!

About schools – the Grammar is now completely subject to the Education Authority, but has traditionally more prestige. Robert Gordon's College is also v. good and has more autonomy. There would possibly be no harm in writing to either or both. The full style of the Rector of the Aberdeen Grammar School is James J Robertson OBE, MA, BSc, FRSE;<sup>111</sup> that of the Headmaster of Robert Gordon's College is D E Collier, MC, MA, BSc.

As regards classes, I expect that I shall see Parker at the Senatus meeting and will have a word with him then.<sup>112</sup> I doubt, however, if you will get a house of the size you want in Old Aberdeen unless a Prof dies or retires and a manse becomes free.<sup>113</sup>

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<sup>110</sup> AUL, Acc 115, 57/97.

<sup>111</sup> Jonathan Daube (note 6), 142-3, notes Robertson as one of the "Six men who could intimidate DD". He was one of the leading head teachers of his day in Scotland.

<sup>112</sup> Alexander (Alec) A. Parker (1908-1989); see further above, 000.

<sup>113</sup> The 'manses' were and are the properties on the Chanonry street leading to St Machar's Cathedral in Old Aberdeen. Originally the homes and grounds of the canons of the Cathedral chapter, post-

Further, though house prices are coming down here, they are probably higher in Aberdeen than anywhere except London. This is partly because the houses are much more permanent in structure and because there is not a fluctuating population. £3,000 would probably not be enough for what you want. You would, however, be pretty sure of getting your money back in the future if you laid down more; and the University would make an advance at low interest, as I mentioned last time. Renting an unfurnished house, alas, is not a very probable solution. The tendency in Scotland has been towards ownership.

Meanwhile, we shall keep our eye on the market. If while we are away you want anything legal done, I would advise you to write to my Assistant – Col A Milne OBE, Messrs Peterkin & Duncan, Advocates, 21 Golden Square, Aberdeen. He would, I am sure, be delighted to help you as he helped me.

This is very scrappy – please excuse it! More detailed news and information I shall give you when I reach Cambridge. I think, if it is convenient to you, that I shall come by the 5 pm train arr 6.20 at Cambridge. Thereafter, I shall be quite capable of making my way to your house – and am much looking forward to seeing your wife and yourself again – and to meet your children. My own brood are as iniquitous as ever. The discrepancy as to the cat and bird incident reported by Carolyn and Roderick<sup>114</sup> can probably be liquidated by taking their references as being to different incidents. Unfortunately the cat has many feathered victims to her credit or discredit.

Randall Philip,<sup>115</sup> here for orals, told me how distressed he was to miss you in Edinburgh, and that his arrangement with Candlish Henderson<sup>116</sup> had fallen through. He was preparing to write to you on a point of canon law and trusts.

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Reformation they became the official residences of the University's major office-holders and some professors: see OLD ABERDEEN: BISHOPS, BURGHERS AND BUILDINGS (John S. Smith, ed., 1991), 85-6.

<sup>114</sup> Smith's two older children. The youngest was another daughter, Jenefer.

<sup>115</sup> Randall Philip (1900-1957) was a leading member of the Scottish Bar who had supported Smith in the development of his academic career and acted as an external examiner in the Aberdeen Law Faculty. See further on his life Sheriff Principal G. S. Gimson, *Introduction*, in PHILIP JOURNAL (note 79), xiii-xvi. For Philip's favourable impression on finally meeting Daube in Aberdeen in June 1951, see id, 225; and for a subsequent encounter in July 1955, id, 482-3.

<sup>116</sup> Professor of Scots Law at the University of Edinburgh 1922-1947 (John W. Cairns and Hector L. MacQueen, *LEARNING AND THE LAW: A SHORT HISTORY OF EDINBURGH LAW SCHOOL* (2000), 25, 30).

With all good wishes

Aye yours

Tom Smith

PS About Jonathan – point out that he will be 14 at the time you want him admitted. Otherwise he will be caught up in the general scramble of the 12/13 group. You might give the Principal as a referee. TBS.

### LETTER 3<sup>117</sup>

29 Chesterton Hall Crescent

Cambridge

10 August 1950

My dear Smith

Yesterday we returned from France, and as our mail had not been forwarded, it was only then that your charming letter reached us. Of your much too generous presents to the children, Jonathan had indeed written to us in France. Do you know that we always wanted to buy the Story of Babar for Jonathan when he was small, but thought it too extravagant. Now an old wish is fulfilled. The ABC has all the French elegance. And the Central Highlands are a joy to read. I am looking forward to seeing the lovely places sketched by D. Y. Cameron.<sup>118</sup>

We had a grand time in France, the Cathedrals of Coutances and Lamballe, the Mont St. Michel and the sleepy old town of Briquebec (an unexpected discovery, but sanctioned by Queen Victoria's approval) being the outstanding events. The weather was favourable throughout the three weeks. The only rainy day was when I was

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<sup>117</sup> EUL Special Collections, GB 237/Coll-1250 (previously printed in MacQueen (note 3), 30-1).

<sup>118</sup> The book was most likely HIGHWAYS AND BYWAYS IN THE CENTRAL HIGHLANDS by Seton Gordon (1886-1977), which was published in 1949 and for which Sir David Young Cameron (1865-1945), a painter-etcher, famous in particular for his etchings and drypoints of Highland Scotland, provided the illustrations.

anyhow exceedingly lazy after too much cidre, the alcoholic qualities of which I had underestimated. But the peninsula from Cherbourg to Avranches has suffered terribly.

I need not repeat how much I appreciate your and your wife's patience and thoughtfulness regarding the problem of our house. I enclose a letter I am sending to Colonel Milne. You will see that I have taken your advice. But probably the houses are sold already. I am sending Alec Parker another copy of the letter.

You may remember that I mentioned to you something about the office of King's Counsel lapsing or not lapsing on the king's death. You were kind enough to declare yourself interested. So would you glance at the last paragraph of the attached note, on p. 518.<sup>119</sup>

I hope you are all enjoying your stay in Devon.

My wife asks to be remembered.

Kindest regards

Yours ever

David Daube

#### LETTER 4<sup>120</sup>

Department of Law  
University of Aberdeen  
Old Aberdeen  
16 Sep 50

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<sup>119</sup> This is Daube's article, *Hadrian's Rescript to Some ex-Praetors*, 67 ZSSR, 511-8 (1950), listed in the collection of Smith's Daube offprints by MacQueen, (note 3), 23, 28. Daube mentions in the article how practice changed in England from 1604, when King James I, induced by Francis Bacon, began to grant the office of King's Counsel so as to bind his successors.

<sup>120</sup> AUL, Acc 115, 57/97.

My dear Daube

We are back full of life after a most interesting summer. Naturally, I find myself overwhelmed with administrative problems on my return. Cramb<sup>121</sup> has been told that his services in Roman Law will not be required in 1951/52, and I believe that there is a measure of unrest or disquietude among other part time lecturers. This will not be an easy year for the Dean! However, as I said before, it is far better that the storms should blow up before you come, so that there can be no question of you becoming implicated. The changes are in the interests of the 'Academia' – and that is the overriding consideration.

Enclosed is a further salvo on Scottish consistorial law for your edification or otherwise.<sup>122</sup>

Ann and I very much appreciated your card – a charming one, and the innuendo was appreciated.

Our very best wishes to you all – and is there aught I can do?

Aye yours

Tom Smith

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## LETTER 5<sup>123</sup>

Department of Law  
University of Aberdeen

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<sup>121</sup> Maurice Cramb: see above, 000 and accompanying notes 38 and 39.

<sup>122</sup> This was probably *Epilogue to Epithalamium* 13 MODERN L.R. 340 (1950), a critical commentary on the decision in *Lennie v Lennie* 1950 SC (HL) 1 that in Scots as in English law refusal of marital sexual intercourse was not the matrimonial fault of desertion. Smith had earlier discussed the question in *Epithalamium: a Scottish Trilogy* 12 MODERN L.R. 162 (1949). He had previously and successfully argued the point as counsel for the pursuer in an undefended divorce case: see *MacDonald v MacDonald* 1948 SLT 380. An epithalamium is an ode or song, sometimes with obscene content, in honour of a bride and groom approaching their nuptial chamber.

<sup>123</sup> AUL, Acc 115, 57/97.



Old Aberdeen

9 Jan 51<sup>124</sup>

My dear David

Many thanks for your letter and for the offprints which are much appreciated. It is indeed the hallmark of merit to have influence<sup>125</sup> the translation of Holy Writ. Have you, I wonder, considered Matthew 7.29 and Mark i, 22. The Principal was preaching on the point last term, and I advanced the proposition, based on Canon Deane, that the sentence “the people were astonished at his doctrine, for he taught them as one having authority and not as the scribes” was wrongly interpreted. The scribes, as a layman might think, would teach with authority, and the sense may well be “he taught as one having authority (but) not as the scribes”.

This vacation I have been working flat-out on the Scottish Criminal law, and am now rather jaded. What started as a short essay for the Juridical has now got rather out of hand in bulk, as I found myself questioning a number of basic assumptions in the course of my investigation.<sup>126</sup> The indirect stimulus is the visit to us for the coming term of Van Bemmelen, Professor of Criminology at Leyden.<sup>127</sup> Donnedieu de Vabres ‘Droit Criminel’ I have found very stimulating as a companion in critical analysis.<sup>128</sup>

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<sup>124</sup> The letter has ‘50’; but the correction here seems justified by the context of the letter itself (especially the final two paragraphs), the informal salutation of “My dear David” where throughout 1950 Smith had been using what was then the more formal “My dear Daube” (see Letters 2 and 4), and finally here signing himself “Tom” rather than his previous “Tom Smith”. Probably so early in 1951 Smith had not yet habituated himself to dating correspondence with that rather than the preceding year (a problem the present writer continues to have when writing cheques in January).

<sup>125</sup> Sic.

<sup>126</sup> It does not seem that any immediate major publication came from this work, although note the following articles published in 1953: *Scottish Criminal Law* SCOTS LAW TIMES (NEWS SECTION) 173 (1953) (text of a BBC Third Programme talk given in February 1953); *Capital Punishment: a Scottish Commentary on the Proceedings of the Royal Commission [on Capital Punishment]* SCOTS LAW TIMES (NEWS SECTION) 197 (1953). Most of Smith’s major writings on criminal law were published between 1957 and 1962 and were re-published as the last three chapters of his *STUDIES CRITICAL AND COMPARATIVE* (1962): see further the bibliography by Ross Gilbert Anderson in *MIXED LEGAL SYSTEM IN TRANSITION* (note 8) 304-6.

<sup>127</sup> Professor Jacob Maarten van Bemmelen (1898–1982) held the Leiden Chair of Criminology 1931–1968: Th.W. van Veen, *Bemmelen, Jacob Maarten van (1898-1982*, in *BIOGRAFISCH WOORDENBOEK VAN NEDERLAND*, <http://www.historici.nl/Onderzoek/Projecten/BWN/lemmata/bwn4/bemmele> [10-02-2012], accessed 25 September 2012. I owe this reference to Professor Ewoud Hondius.

<sup>128</sup> Probably a reference to Henri Donnedieu de Vabres, *TRAITÉ DE DROIT CRIMINEL ET DE LEGISLATION PÉNALE COMPAREE* (1947). A second edition of Donnedieu de Vabres, *PRÉCIS DE DROIT*

However, when starts the term, then I shall be in thralldom of administration duties. To this I have sacrificed the academic year 1950/51 – and hope that the fruit it bears will justify the weariness of spirit.

Jurisprudence in the summer is for lawyers only. I have set them a short essay at Christmas. You might like to see the fruit. The other courses we can discuss when you come. At present Scots Legal History is an idea which exists only in my own mind.

Sandy Milne is back on his feet, and is pressing on with your affairs as fast as administrator cogs will permit. Don't bother about the date for re-paying the unsecured loan. Butchart is off to Switzerland to ski (amazing at his age), but he can easily be settled.<sup>129</sup>

I have already seized the small room next to my own, hitherto used for small lecture classes, to have it transformed into a private room for you. We shall post sentries if necessary to evict the dispossessed!

With all best wishes,

Aye yours

Tom.

## **LETTER 6<sup>130</sup>**

*(Memorandum by TBS to DD 23<sup>rd</sup> May 1951)*

Reference Draft Proposed Synopsis for University Calendar

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CRIMINEL, appeared in 1951, the copy of which in the Edinburgh University Library was a gift from, and is autographed by, T.B. Smith. Donnedieu de Vabres, born in 1880, died in 1952.

<sup>129</sup> Henry Jackson Butchart DSO, OBE, TD, DL, BL, LLD was the Secretary, Factor and Law Agent of the University of Aberdeen from 1919 to 1952. See various tributes around the time of his retirement in 34 ABERDEEN UNIVERSITY REVIEW 321-5 (1952) (with portrait); 35 ABERDEEN UNIVERSITY REVIEW 51-2 (1953). See further note 149 below.

<sup>130</sup> AUL, Acc 115, 4/97.

Jurisprudence: I entirely agree with regard to the ordinary course. The only additional suggestions I would make would be as to books recommended. You might care to consider –

Goodhart's Essay on Jurisprudence and the Common Law

Gardner's Judicial Precedent in Scots Law

Eastwood & Keeton's Austinian Theories of Law and Sovereignty

Lorimer's Institutes of Law and (2) Institutes of Law of Nations; or do you think his Natural Law theories no longer of value? He was the last Scotsman to write competently on the matter.<sup>131</sup>

With regard to Advanced Jurisprudence, this course will first come into operation in 1953. I agree that Synopsis should appear in our Calendar now with the explanation that the Course will not be run until 1953. It would, I think, be wise in the first Course of Advanced Jurisprudence to choose topics less closely identified with Roman Law. Would you consider the suggestions of modern Roman Catholic legal theory and Soviet theory of law? I suggest, also, that you delete reference to examination in hoc statu.

Roman Law: Your suggestion for the ordinary Course seems admirable. You may find it necessary to temper the wind to the shorn lamb during the first year of your regime, though I have complete confidence that the students will come up to your standard in a very short time. It would be worth while, I think, for the Class Library to secure immediately at secondhand a number of the prescribed books from which students may be expected to translate. It is a relevant consideration that the average student in Aberdeen has to exercise considerable economy in purchasing books. It might not be unreasonable for the Class Library Grant to be asked to purchase a number of texts.

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<sup>131</sup> All of these, and several other works from Anglo-American jurisprudence, eventually appeared in the Jurisprudence reading list (published in ABERDEEN UNIVERSITY CALENDAR 1951-52, p 380). But the list also included Helmut Coing, GRUNDZÜGE DER RECHTSPHILOSOPHIE (1950); Louis Le Fur, LES GRANDS PROBLÈMES DU DROIT (1937); and William Buckland, SOME REFLECTIONS ON JURISPRUDENCE (1945), which may well have been Daube's suggestions.

Advanced Roman Law: I again agree, except here again I suggest that in hoc statu no reference be made to examination. We should make it clear that Advanced Roman Law will not be the subject of a Course until 1953. The Class Library Grant might again be applied to purchase as many secondhand Mackintoshes as we can.<sup>132</sup> These are, I think, out of print and we should do well to corner the market before Edinburgh select this title of the Digest for their special study. We should also probably acquire a number of copies of Zulueta.<sup>133</sup> We should take action on this now in consultation with MacRitchie<sup>134</sup> since the Class Library Grant has not yet been fully expended.

T.B.S.

### LETTER 7<sup>135</sup>

Department of Law  
University of Aberdeen  
Old Aberdeen  
12 Jan 52

My dear David

We send many thanks for your p.c. and our best wishes to you both. Here there is indeed frost – but probably rather less sunshine than in Montana! Ann has visited 65 Osborne Rd<sup>136</sup> from time to time and reports on the flourishing state of the Clan Daube – and of Miss Parker.

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<sup>132</sup> Since the Advanced course was to focus on sale, this probably is a reference to James Mackintosh, *THE ROMAN LAW OF SALE WITH MODERN ILLUSTRATIONS : DIGEST XVIII.1 AND XIX.1 TRANSLATED, WITH NOTES AND REFERENCES TO CASES AND THE SALE OF GOODS ACT* (2nd edn., 1907), rather than the same author's *ROMAN LAW IN MODERN PRACTICE* (1934).

<sup>133</sup> Francis de Zulueta, *THE ROMAN LAW OF SALE : INTRODUCTION AND SELECT TEXTS* (1945).

<sup>134</sup> Farquhar MacRitchie, C.B.E., (1902-1988), Professor of Conveyancing 1946-74, and also a partner in the local solicitors' firm of Morice & Wilson (see death notice, 33 *JOURNAL OF THE LAW SOCIETY OF SCOTLAND* 228 (1988); also David M. Walker, *Legal Education in Scotland 1889-1988*, 33 *JURIDICAL REVIEW* 184, 206, 203 (1988)).

<sup>135</sup> Acc 60, 7/253.

<sup>136</sup> The Daube family address in Aberdeen was in fact 65 Osborne Place.

The most recent item of interest is that Noble<sup>137</sup> has been appointed Principal of King's College, London, and will thus be leaving us in the summer. He is an excellent academic administrator, but this presumably is the final election between administration and scholarship. It is not possible these days to combine them in any real sense. So far I have heard no speculation as to his successor in the Chair of Humanity here. Bickersteth will presumably succeed him as Dean of Arts – a prospect which does not appeal to him at all.<sup>138</sup>

The Aberdeen University Law Society which has just been laid in the cradle is to make its first public appearance on Feb 29<sup>th</sup>. After much negotiating and pestering of divers persons I have got the Elphinstone Hall for the Inaugural Dinner. The toast of the 'Scottish Legal Tradition' will be proposed by Ehrenzweig (Prof of Comparative Law at California)<sup>139</sup> and the replies will be by the Lord Justice-Clerk (for the Bench),<sup>140</sup> The Dean of the Faculty of Advocates (for the Bar),<sup>141</sup> the oldest Aberdeen lawyer, R.M. Williamson (for the Solicitors) and Randall Philip<sup>142</sup> (for Scottish Legal Scholarship) – Principal to be in the Chair. If Kunkel<sup>143</sup> agrees, I propose to ask him to reply for 'the Guests'. Part of the proceedings may be broadcast – in which case I shall send particulars to Montana.

Hamish Gow<sup>144</sup> is settling in well, and his zeal knows no bounds. His wife had a day or so in hospital, but is now back at their home in Cults. Ann speaks well of her, and I trust her judgment in these things.

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<sup>137</sup> Peter Noble (1899-1987) held the Regius Chair of Humanity at Aberdeen 1938-1952 and was then Principal of King's College London until 1968. He was knighted and is not to be confused with Sir Fraser Noble (1918-2003), who lectured in political economy at Aberdeen 1947-1957 (and was also interested in the classics), before moving on to become successively, Secretary to the Carnegie Trust until 1962, Vice-Chancellor of the University of Leicester until 1976, and, finally, Principal of Aberdeen 1976-1981. A modern building in the Aberdeen campus is named for Fraser Noble.

<sup>138</sup> Geoffrey Bickersteth, Regius Chalmers Professor of English Literature at Aberdeen 1938-1954. In fact Professor Henry Hamilton (Political Economy) became Noble's successor as Dean of Arts 1952-1955.

<sup>139</sup> See above, 000.

<sup>140</sup> Lord Thomson, Lord Justice Clerk (i.e. the second most senior figure in the Scottish judiciary) 1947-62: see John N. Speirs, *A Catalogue of the Senators of the College of Justice (1834-1972)*, SCOTS LAW TIMES (NEWS SECTION) 235 (1972).

<sup>141</sup> Sir John Cameron KC, Dean of the Faculty of Advocates (i.e. leader of the Scottish Bar) 1948-55; later, as Lord Cameron, a judge in the Court of Session and the High Court of Justiciary (Speirs (note 140), 238).

<sup>142</sup> See above, 000.

<sup>143</sup> See above.

<sup>144</sup> See above, 000.

We look forward above all to your return as a giant refreshed – but, to mix the images – do remember not to spoil the ship for a ha’porth of tar or the cure for excessive impatience.

Our very best wishes to you both

Aye yours,

Tom

### LETTER 8<sup>145</sup>

Department of Law  
University of Aberdeen  
Old Aberdeen  
23rd January, 1952

Professor D Daube  
Primrose Clinique  
Montana-Vermala  
Switzerland

My dear David

I have spoken to Douglas Simpson,<sup>146</sup> who will expect the consignment from Lewald.<sup>147</sup> I suggest therefore, if you have any further consignments, that you might write direct to the Librarian, Douglas Simpson, since I have now put him in the picture. The position is that you received a Carnegie Grant of £1000 of which £600+

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<sup>145</sup> AUL, Acc 60, 7/253.

<sup>146</sup> William Douglas Simpson (1896-1968) had become University Librarian in Aberdeen in 1926 and held the post for forty years. He was also a noted writer on archaeology and the architecture of historic buildings. His papers are preserved in Aberdeen University Library, reference number GB 231, MS 2229; MS 2230; MS 2285; MS 2398; MS 2498; MS 2729; MS 2818/1-30; MS 2968; MS 3042; and MS 3442.

<sup>147</sup> Professor Hans Lewald (1883-1963): see above, 000.

was expended on the Savigny Zeitschrift. Simpson will cope – present authority up to One Hundred Pounds.

I have no idea who will succeed Noble. I agree that there are very few Latinists in the country who are in touch with Roman Law. Indeed, there are few who know anything about it. I do not know when the choice will be made, but there is little that we can do about it. The matter will be in the hands of the University Court, and as you know, the Principal is especially interested in the Classics.

Quite frankly, I should not advise you to accept any foreign invitations for the present. This is an entirely personal view, and one which I would not have expressed had you been able to spend more time here. My impression is that the bread and butter of preparing *précis*, etc. for distribution to Jurisprudence and Roman Law students will take a good deal of time, and that there will be a deal of rather dull routine to carry out before the next academic year. There would clearly be no objection to you spending a day or so of the summer holiday in Kiel, but I do not think that in the circumstances the University would welcome your absence during Term time once you have returned. The Professors who have been released to give a course of lectures abroad have been those who are senior and have the work of their departments thoroughly organised and capable of being carried on by staff whom they have trained themselves. Unfortunately, we have not got to that stage yet. It is, however, merely my own opinion and I have not discussed the matter with anyone else. Certainly I should not suggest raising the matter with the Principal just at the moment. He is hard pressed by very many problems just at present, and in particular the very heavy responsibility of arguing the University's case before the University Grants Committee. On this the whole course of the University during the next five years depends, and although there are many things which I would like to discuss with him, and plans for the future which I would like to propose, I have imposed on myself a self-denying ordinance until his immediate worries are past.

In this connection I have learned that Volterra<sup>148</sup> has not succeeded in being nominated for an LL.D this year. I am afraid that my earlier view has been justified

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<sup>148</sup> Professor Edoardo Volterra (1904-1984): see above, 000.

that it was dangerous to let the proposal go forward this year when there was no member of the Law Faculty on the LL.D. Committee. I would rather have waited, and I think that had there been a member of the Law Faculty on the Committee in the year he was put forward he would have got through without a doubt. This time the LL.D. Committee are mainly doctors (whose Faculty candidate last year, incidentally, was rejected). I know this will be a disappointment for you. I do not yet know who the six persons selected are, but will know next month. Most of them, I expect, will be medical men. However, I have discussed this problem with MacRitchie, and we think that we might reasonably put forward his name again some time in the future. Certainly, however, I should not risk doing it again unless one of the Law Faculty professors were on the Committee. I know nothing of the inner deliberations, though, as Parker was on the Committee, he may be able to tell you something more about it. It occurred to me to protest the matter at the next Senatus Meeting, as is legally competent, so as to have the matter remitted back to the LL.D. Committee. On reflection, however, I have concluded that it would just add to the Principal's worries, and as none of us serve on the LL.D. Committee, even if it were remitted back no good would come of it and we should merely have advertised to a wider section of the Senatus than was necessary that our candidate had been rejected.

*[The letter now switches from typescript to manuscript.]*

1 Feb

I had second thoughts, which as usual were wrong when I disregard the voice of MacRitchie's experience, and raised in the Senatus the question of remitting back the LL.D. Committee's Report. Though I have subsequently had sympathetic messages from my colleagues who would have welcomed Volterra as an LL.D., my motion got very rough handling at the time. It is not well received to query the deliberations of the LL.D. Committee. As Butchart has been nominated (one lawyer at least!) and as the Senatus resolved to give him his robes, a remit back would have been in effect a vote of no confidence in the whole list incl Butchart.<sup>149</sup> The whole matter has been most worrying and disappointing, and I have resolved never to press any candidate

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<sup>149</sup> Butchart's honour marked his retirement after 33 years as University Secretary: see above, note 129. Smith gave the laureation at the degree ceremony at which the degree was conferred: see 35 ABERDEEN UNIVERSITY REVIEW 69 (1953).



again unless we have a man on the committee. It is like trying to legislate without a majority in the House.

The Dinner has also caused much unpleasantness from local bigwigs who think that they should get free lunches. As I have to pay for all the guests out of my own pocket, and as the local society has given the University Society no encouragement at all, I was not disposed to be conciliatory. The brewing of bad blood was, alas, inevitable.

Anent the books from Lewald – as I have noted above, Simpson will meet bills up to £100. This leaves you £300 (approx.) unexpended of the Carnegie grant. If, as I expect, you need more, would you raise this direct with the Principal? Remember also that Jurisprudence is your main commitment and Roman Law the second string – and there are many regrettable gaps in the Common Law side of Jurisprudence. Another word of advice – there is going to be a very definite cut in the grants to Universities in view of the state of the national finances – so it is worth getting your position regarding grants for equipping the Jurisp and R.L. sections settled reasonably soon. It will be by far the best plan if you settle matters with the Principal and Simpson direct, since the questions which arise are the province of your Dept. I will, of course, give any moral support required.

Quite frankly the present load of administration has eventually got me down. During the last few weeks I have felt more and more tired, have achieved less and less academic work, and now have taken to my bed pouring blood from the nose. Hence this very beastly scrawl! If (and it is a big if) we get a proper establishment for staff in the Law Faculty (i.e. full time) I intend to urge MacRitchie to take over as Dean this summer.<sup>150</sup> In present circumstances I get no time to think far less write!

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<sup>150</sup> MacRitchie in fact became Dean of Law for the first time in 1953. I am indebted to Professor David Carey-Miller for assistance on this point.

Your Review I shall pass on to Thomson.<sup>151</sup> It seems well worth Dr. Julius' attention too.<sup>152</sup> In Scots Law we still use 'redargue' as a term of art – a desire 'stare super antiquas vias'?

Your letter of 29 Jan just to hand. As regards Bethmann Hollweg, I should advise you to go slow on that until you get the position regarding the Jurisprudence and R.L. Section clarified with the Principal and Librarian.<sup>153</sup> When you know what money you can call on, then it will be easier to allocate priorities. It might be wise to ascertain – before applying for the requisite grant – what is needed on the Jurisprudence side and then what the lump sum value will be of whatever we want from Lewald's Library.

I return Lewald's letter as also the estimate of Prager.<sup>154</sup> Presumably the former will submit a formal account to the Librarian in due course.

The children are now back at School and flourishing: Carolyn quite recovered – and have enjoyed the snow rather more than Ann does. Aberdeen has not all the advantages of Switzerland, alas! I wish I could join you for a space – and will no doubt feel even more like it after the end of Feb when we shall have Ehrenzweigs, Camerons, Philips, Justice-Clerks etc upon us. I have passed on to Noble etc the information regarding Kunkel's visit. Noble himself will be away, but will cancel his class to enable the Honours students to attend K's lectures.

Very many thanks for the "Praetor peregrinus" which I have promised myself the pleasure of reading on Sunday.<sup>155</sup> May you go from strength to strength and return a

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<sup>151</sup> Dr G. R. Thomson (1911-1987), then Editor of the *Juridical Review* (see D.M.W., *George Robert Thomson, 1911-1987*, 33 JURIDICAL REVIEW 1-3 (1988)). The review was the third of three by Daube published in 64 JR 91, 92, 93 (1952), the book reviewed being R Piccard, E Thilo and E Steiner, *DICTIONNAIRE JURIDIQUE FRANÇAIS-ALLEMAND ET ALLEMAND-FRANÇAIS* (1950), of which Daube noted that the authors defined obsolete terms such as '*redarguer*', to find fault with'. Hence Smith's comment about the continuing use of 'redargue' in Scots law. See further below, note 161.

<sup>152</sup> Dr Julius Fackenheim. See above, 000.

<sup>153</sup> Probably a reference to a prospective purchase of Moritz August von Bethmann-Hollweg *DER CIVILPROZEß DES GEMEINEN RECHTS IN GESCHICHTLICHER ENTWICKLUNG* (6 vols, 1864-74). I am grateful to Bill Gordon and Peter Stein for identifying this reference for me. There are two sets of the book in the Aberdeen University Library, one from the de Zulueta collection, and the other, purchased with Library funds, perhaps the one referred to here.

<sup>154</sup> Presumably a valuer of the Lewald library.

veritable lion. Jurisprudence in Scotland has not had a reasonable exponent since Lorimer – and I look forward to his mantle falling upon the Prof of Jurisprudence at the University of Aberdeen. In some ways it is an even more deserving cause than R.L. in which there are already many able pers[ons?] at work. May you have the vigour to embark on a work on Jurisprudence for the Scottish student based on the Principal's Memo. You are the one man I know who could tackle it.

Love from us all. Get really well and then for a feeding of starved student minds and the stocking of the empty cupboards of Scottish Jurisprudence. Would that I could win free from administration to do the same for the Scottish Law of Contract.<sup>156</sup>

Aye yours

Tom

#### LETTER 9<sup>157</sup>

Department of Law  
University of Aberdeen  
Old Aberdeen  
20th February, 1952

Professor D Daube  
Primrose Clinique  
Montana-Vermala  
Switzerland

My dear David

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<sup>155</sup> *The Peregrine Praetor*, 41 JOURNAL OF ROMAN STUDIES 66-70 (1951). This is found in Smith's surviving collection of Daube offprints (see MacQueen (note 3), 23, 28).

<sup>156</sup> On this never fulfilled ambition of Smith's, see MacQueen, (note 25), 138-72. In a book review published in 68 JURIDICAL REVIEW 107 (1956), Randall Philip stated that Smith was preparing a new edition of the standard Scottish work on the subject, *Gloag on Contract*, the last edition of which had appeared in 1929.

<sup>157</sup> AUL, Acc 60, 7/253.

I am engaged at the moment in emending where necessary the contents of the University Calendar relevant to the Law Faculty. A subject for the Hunter Gold Medal in Roman Law has to be approved at the next Faculty Meeting, and inserted in the Calendar. Would you please let me have your suggestion? You may recall that the subject set for the current year was "Traditio". My only observations would be that the difficulties of the existing Library facilities might be considered when the subject is set, and, on the other hand, lectures by Kunkel might be taken into consideration in selecting a topic for next year.

I had a letter from Kunkel yesterday, and am very much looking forward to his visit. For your information, I enclose a copy of the notice issued to members of the Law Faculty and others interested.<sup>158</sup>

We hope that you continue to make good progress, and will miss you at the Dinner on the 29<sup>th</sup>.

With all good wishes

Aye yours

Tom

### **LETTER 10<sup>159</sup>**

Department of Scots Law  
University of Aberdeen  
Old Aberdeen  
21 Feb 1952

My dear David

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<sup>158</sup> A copy of this notice may be found in AUL, Acc 115, 4/97. It shows that Ehrenzweig spoke on Wednesday 27 February at 9.30-11.30 on "Enterprise Liability and Liability Insurance", while Kunkel began the same day at 12 -1 on "Greek and Roman Legal Thinking". On Thursday 28 February Ehrenzweig spoke on "Psychology and the Law" 11-12 and Kunkel on "The Origin and Social Position of the Roman Jurists" 12-1. Kunkel was also to lecture in German to the German Department on 3 March at 12, on "Die Reception des Römischen Rechts in Europa".

<sup>159</sup> AUL, Acc 60, 7/253.

Very many thanks for your letter of the 18<sup>th</sup>. Ann is most grateful for the stamps and indeed had staked her claim before the letter reached me.

Do not misunderstand me regarding the books. I entirely agree about the books you have arranged from Lewald. My one concern was that you should not exhaust your existing grant and then find you wanted something in a hurry and be frustrated because the money was not there. The ordinary delivery channels will not cover your basic needs. Therefore, my advice to you is to prepare a detailed proposal with the cost in sterling and ask the Court for a special grant. This you would be wise to discuss with the Principal. The ordinary routine Library business goes through Simpson. He is always trying to economise, since with recent cuts in University finance, the Library like other Depts has to make economies.

A man who can give you better guidance on the ways of the Library is MacRitchie. Indeed I feel strongly that my academic work has suffered badly by excess of administration since I came here, and I hope that MacRitchie will agree to take over the Deanship in the next academic year. He is a good committee man and is much less turbulent than T.B.S. My two main remaining objectives are full time staff and the introduction of a D.Jur degree. Thereafter I hope to lead a scholarly life and get some writing done! Of this I see no chance till the admin is shelved. My proofs just accumulate from last summer!

I will send a full report – Kunkel and Ehrenzweig in just over a week.

Love from all. We hope you continue to progress. When should we expect your return as a giant refreshed?

Aye yours

Tom

LETTER 11<sup>160</sup>

Department of Law  
University of Aberdeen  
Old Aberdeen  
4th March, 1952

Professor D Daube  
Primrose Clinique  
Montana-Vermala  
Switzerland

My dear David

Your reviews are admirable, and I have sent them on to Thomson.<sup>161</sup> The Scottish term is 'enorm lesion'. You certainly have been generous to Dalrymple.<sup>162</sup>

Kunkel has made a very favourable impression here, and though the last week has certainly been exhausting, we all have profited greatly thereby. I have asked Kunkel to let us have his first lecture for the *Juridical Review*,<sup>163</sup> and he is also prepared to let us have the second lecture for the *Aberdeen University Review*<sup>164</sup> – because it is not a specifically legal Journal and thus would not compete with his book. Another of his achievements was a very elegant speech at the Inaugural Dinner of the Aberdeen University Law Society, which we also have to record. He is a most charming and cultured person to meet, and I trust that we shall have an opportunity of seeing him again. The Inaugural Dinner seemed to go according to plan, and it was pleasing that

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<sup>160</sup> AUL, Acc 60, 7/253.

<sup>161</sup> These may be some more of the reviews published in 64 *JURIDICAL REVIEW* 91, 92, 93 (1952) (see above note 151). The first and second books reviewed there were respectively Friedrich Karl von Savigny, *JURISTISCHE METHODENLEHRE*, (Garland Wesenberg, ed., 1951), and A. W. Dalrymple, *A FRENCH-ENGLISH – ENGLISH-FRENCH DICTIONARY OF LEGAL WORDS AND PHRASES* (2nd edn., 1951). The context for Smith's allusion to 'enorm lesion' is provided by Daube's observation of the latter book that under *lesion* no reference was made to the Scots law equivalent.

<sup>162</sup> Alexander Williamson Dalrymple (1874-1958) was an advocate, i.e. a member of the Scottish Bar, who was briefly Chief Justice of the Seychelles in 1909 and 1911-12: see Stephen P. Walker, *THE FACULTY OF ADVOCATES 1800-1986: A BIOGRAPHICAL DIRECTORY OF MEMBERS ADMITTED FROM 1 JANUARY 1800 TO 31 DECEMBER 1986* (1987) 194.

<sup>163</sup> Published as Wolfgang Kunkel, *Legal Thought in Greece and Rome* 65 *JURIDICAL REVIEW* 1-16 (1953).

<sup>164</sup> The lecture was eventually published in the *Juridical Review*: see Wolfgang Kunkel, *On the Origin and the Social Position of the Roman Jurists*, 66 *JURIDICAL REVIEW* 148-63 (1954).

we had so distinguished a gathering assembled. No doubt Herta has sent you the photograph from the Press & Journal.

Re the 'Hunter', I think that one subject only is competent under the Regulations. Paragraph 3 thereof commences "The subject of the essay for each year shall be announced etc." It is not easy to decide which of the three subjects you mention should be selected. "The Social Position of the Classical Roman Jurists" is, to my mind, the most attractive, but I wonder if there is any material in English reasonably accessible to candidates in Aberdeen. "Marriage and Divorce in Roman Law" and "Sale in Roman Law" are also "possibles". My one comment on "Marriage and Divorce" is that (to quote Kunkel) it is preferable to stick to History, Property and Obligations these days, and to sacrifice Persons and Succession as not sufficiently relevant to modern legal ["study" scored out] to justify their detailed study. I wish that you had been present to join in this discussion, since your suggestion of this topic makes me wonder whether you share this view of your own teacher! "Sale in Roman Law" seems to me so large a topic that it could scarcely be attempted by one who had not considerable time and facilities for research. It follows that I would give my voice to "The Social Position of the Classical Roman Jurists" if the raw material is available here in English. If not, then would you consider some aspect of Sale in Roman Law, e.g. "Error", or some other like topic. You are, however, the man most concerned in this matter, though it may fall to me to advance your views at the Law Faculty Meeting, and I would like to be in your mind on the points at issue. Meanwhile, I shall put on the agenda "Subject for Hunter Gold Medal", and I should have your reply before the Law Faculty meets.

I am delighted to hear that the weather is improving in Switzerland, and trust that it is doing you a lot of good.

With all good wishes

Aye yours

Tom

P.S. Telegram sent by Peter<sup>165</sup> and yourself was very much appreciated by all present at the Dinner. It was resolved to send one in reply. I hope that the students charged with the duty have not been so overwhelmed by the imminence of the Conveyancing Examination as to have failed in this duty.

P.P.S. I enclose, in the hope of creating a modicum of nostalgia, a brief Note which I did on the last S.P.T.L. Conference, but, as you will deduce, the anonymous ventilation of Scots Law was by the author of the Note.<sup>166</sup>

## LETTER 12<sup>167</sup>

Department of Scots Law  
University of Aberdeen  
Old Aberdeen  
12 Mar 52

My dear David

I just got back from London in time for today's Law Faculty meeting, and picked up your letter before going in. We settled on 'Risk in the Roman Law of Sale'. This is especially interesting from the viewpoint of Scots Law, since until the S.G.A. 1893 Scotland followed R.L. practice in contrast to England.<sup>168</sup>

Your query regarding R.L. and Jurisprudence students – the classes coincide approximately 95% - but there are a few individuals who attend one, but not the other. Although Jurisprudence is your major commitment and R.L. the minor one, I would suggest that during the summer term you should only wrestle with Roman Law and leave Jurisprudence to Gow.<sup>169</sup> Gow is not over pressed this summer but Dr Julius is rather busy with his Comparative Law. I think you are rather rash and gallant in

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<sup>165</sup> This is probably a reference to Peter Stein.

<sup>166</sup> T. B. Smith, *Discere Docendo*, SCOTS LAW TIMES (NEWS SECTION) 37 (1952). The S.P.T.L. (the Society of Public Teachers of Law). Now the Society of Legal Scholars, the organisation is the premier association of law academics in the U.K. T.B. Smith was its President in 1971-72. See further Fiona Cownie and Raymond Cocks, 'A GREAT AND NOBLE OCCUPATION!' THE HISTORY OF THE SOCIETY OF LEGAL SCHOLARS (2009).

<sup>167</sup> AUL, Acc 60, 7/253.

<sup>168</sup> See Sale of Goods Act 1893, s. 20 (now Sale of Goods Act 1979, s. 20) and, for the development of the law, T. B. Smith, PROPERTY PROBLEMS IN SALE (1977), chapter IIA.

<sup>169</sup> Gow's Ph.D thesis was essentially jurisprudential in character: J. J. Gow, THE INTRODUCTION OF THE THEORY OF JUSTICE IN SCOTS LAW (Aberdeen University Ph.D, 1952).



coming back so soon; and please do not spoil your convalescence by cutting it short. In any event you must not lecture more than once per diem next term. Fortunately during the Summer term one only lectures at the outside for about 5 weeks, but, even so, I am very anxious that you should not try too much too soon.

For your very private ear, I believe that we should have authority to employ all full time staff in October. This does not solve all our difficulties, as we must find the right people, and I anyway must undergo a period of local unpopularity. Your problem seems to be already solved in the person of Peter Stein. How much I envy you!

We agree regarding the R.L. course, I think. Fisher<sup>170</sup> with astonishing lack of discrimination overloads his syllabus with Succession and Persons. Most of what matters could have been fitted into History or Obligations.

You may be sure that we all had a real affection and admiration for Kunkel. I am glad he enjoyed his visit. He seemed in some ways to expand when he had put behind him his lectures in English. At the Dinner he was especially good. As company I gave him Randall Philip and David Cairns (a Divine whom Ann and I greatly admire and who has studied in Germany and Switzerland).

We long to see you back – but NOT BEFORE YOU ARE REALLY FIT.

Aye yours

Tom

P.S. Pray allow me to coerce you into joining the Stair Society (one guinea p.a.). Its support from academic lawyers in Scotland is not as great as it should be. The Secretary is Dr. C.A.Malcolm, OBE Ph.D., Signet Library, Edinburgh.<sup>171</sup>

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<sup>170</sup> Matthew Fisher, Professor of Civil Law at the University of Edinburgh 1938-1958 (Cairns and MacQueen, *LEARNING AND THE LAW* (note 114), 26, 30).

<sup>171</sup> The Stair Society, founded in 1934, is the pre-eminent legal history society in Scotland: see <http://www.stairsociety.org>. For its history to 1967, see two articles by Thomas H. Drysdale: *The Stair*

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*Society: The Early Years*, in MISCELLANY V (note 51), 243-60; *The Stair Society: The Middle Years*, in MISCELLANY VI, Stair Society vol 54 (Hector L. MacQueen, ed., 2009), 283-308.